95-653

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC., and HONDA R&D CO., LTD,

Petitioners,

v.

JAMES C. SATCHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States District Court for the Southern District of Mississippi, sitting in diversity in this product liability case, instructed the jury to evaluate the subject Honda Nighthawk motorcycle using a "consumer expectations" standard, ultimately entering judgment on the jury's verdict in favor of Respondent. The matter was appealed to the Fifth Circuit Court of Appeals, which reversed the District Court's judgment, dismissing the case. During the pendency of a request for rehearing, the Mississippi Supreme Court announced that Mississippi was a "risk-utility" state and that federal courts sitting in diversity in Mississippi had been erroneously applying the "consumer expectations" test for numerous years. The Fifth Circuit, then, vacated its earlier dismissal and remanded the case to the District Court which, again, denied a new trial and reaffirmed the jury verdict. Under these circumstances, the Fifth Circuit Panel majority affirmed the award of compensatory damages in favor of Respondent and refused to remand this case for a new trial under the "risk-utility" standard.

The questions presented are:

1. Whether *Erie* requires a federal court of appeals sitting in diversity to remand a case for a new trial where, during the pendency of appeal, the highest court of the forum state announces that the court of appeals' consistent misinterpretation of the forum state's substantive law resulted in the district court's failure to charge the jury with the applicable substantive law.

QUESTIONS PRESENTED – Continued

2. Whether the due process guarantee of the Fifth Amendment of the United States Constitution requires a federal court of appeals sitting in diversity to remand a case for a new trial where it is revealed by the highest court of the forum state during the pendency of appeal that the district court failed to instruct the jury on the substantive law applicable to the case.

LISTING OF PARTIES

The following persons or entities participated in the proceedings in the United States District Court for the Southern District of Mississippi and in the United States Court of Appeals for the Fifth Circuit:

1. James C. Satcher
   Plaintiff in the District Court
   Appellee in the Court of Appeals
   Respondent in the Supreme Court

2. Honda Motor Co., Ltd., American Honda Motor Co., Inc. and Honda R&D Co., Ltd.[1]
   Defendants in the District Court
   Appellants in the Court of Appeals
   Petitioners in the Supreme Court

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[1] A listing of parent companies and nonwholly owned subsidiaries as required by Rule 29.6 is attached hereto at Appendix J.

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Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R&D Co., Ltd. (hereinafter "Honda") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on May 30, 1995.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, Southern Division, denying Honda's motion for summary judgment is reported at 758 F. Supp. 393 (S.D. Miss. 1991). (Appendix B) The District Court's opinion entering judgment in favor of Respondent on the jury's verdict is not officially reported and is attached hereto at Appendix C. The District Court's opinion denying Honda's request for a new trial is not officially reported and is attached hereto at Appendix D. The January 25, 1993 opinion of the United States Court of Appeals for the Fifth Circuit reversing and rendering the District Court's entry of judgment in favor of Respondent is reported at 984 F.2d 135 (5th Cir. 1993). (Appendix E) The Fifth Circuit's May 28, 1993 opinion vacating its January 25, 1993 opinion and remanding this case to the District Court is officially reported at 993 F.2d 56 (5th Cir. 1993). (Appendix F) The District Court's opinion on remand reaffirming its original entry of judgment in favor of Respondent and denying Honda's request for a new trial is officially reported at 855 F. Supp. 886 (S.D. Miss. 1994). (Appendix G) The May 30, 1995 majority opinion of the Fifth Circuit Panel affirming the District Court's denial of a new trial and

award of compensatory damages in favor of Respondent is reported, along with Judge Barksdale's dissent, at 52 F.3d 1311 (5th Cir. 1995). (Appendix A)[2] The Fifth Circuit's denial of Respondent's petition for rehearing and Honda's suggestion for rehearing en banc is unreported and was entered on July 24, 1995. (Appendix H)

JURISDICTION

The majority opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of a new trial and award of compensatory damages in favor of Respondent was entered on May 30, 1995. (Appendix A) The Fifth Circuit denied Respondent's Petition for Rehearing and Honda's Suggestion for Rehearing En Banc on July 24, 1995. (Appendix H)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

[2] The May 30, 1995, Fifth Circuit Panel decision also unanimously reversed the District Court's judgment awarding Respondent punitive damages.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V. (Appendix J)

STATEMENT

The District Court's original jurisdiction over this case was grounded on 28 U.S.C. § 1332 because of diversity of citizenship: Plaintiff/Respondent is a citizen of the State of Mississippi; Defendant/Petitioner American Honda Motor Co., Inc. is a company incorporated in the State of California with its principal place of business in the State of California; and Defendants/Petitioners Honda Motor Co., Ltd. and Honda R&D Co., Ltd. are both companies incorporated in the Country of Japan, with their principal places of business in the Country of Japan.

A. Factual Background

Respondent was injured in October, 1985 while operating a 1984 Honda CB650SC Nighthawk motorcycle designed by Honda R&D Co., Ltd., manufactured by Honda Motor Co., Ltd., and distributed by American Honda Motor Co., Inc. Respondent was operating his motorcycle in a westerly direction on a two-lane highway in Stonewall, Mississippi when he collided with a Ford

LTD four-door sedan in the eastbound lane. The left side of Respondent's motorcycle struck the left front fender and hood of the LTD, traumatically amputating Respondent's left leg below the knee. Respondent subsequently filed this product liability suit in the United States District Court for the Southern District of Mississippi, Southern Division, alleging that Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R&D Co., Ltd. were liable for his injuries under theories of strict liability, negligence, and breach of implied warranties. Specifically, Respondent alleged that the subject Honda Nighthawk motorcycle was defective and unreasonably dangerous because it was not equipped to provide its operator with leg protection in the event of a collision with an automobile, because it was not adequately conspicuous, and because Honda had not provided adequate warning of the dangers inherent in its operation.

B. Procedural History

Honda moved for summary judgment in the District Court on the ground that Respondent's recovery was barred by the fact that the alleged defects in the subject motorcycle were open and obvious under the "consumer expectations" test as that test had previously been enunciated in Fifth Circuit analysis and application of Mississippi product liability law, the substantive law applicable to this diversity case. The District Court denied Honda's motion for summary judgment in a memorandum opinion, *Satcher v. Honda Motor Co., Ltd.*, 758 F. Supp. 393 (S.D. Miss. 1991) (App. 32), and the case proceeded to trial before a Biloxi jury in February, 1991. After presentation of the testimony and evidence, and after hearing and

denying various motions for directed verdict, the District Court instructed the jury that it was to apply a "consumer expectations" analysis in determining whether the subject Honda Nighthawk motorcycle was defective. The jury ultimately returned a verdict in favor of Respondent, awarding him one million twelve thousand dollars ($1,012,000.00) in compensatory damages and two million dollars ($2,000,000.00) in punitive damages. The District Court subsequently entered judgment on the jury verdict in the total amount of two million, nine hundred eighty-five thousand, three hundred fifty dollars ($2,985,350.00).[3]

After the District Court denied Honda's Motion for New Trial, Honda perfected an appeal to the United States Court of Appeals for the Fifth Circuit, which reversed and rendered the District Court's decision. *Satcher v. Honda Motor Co., Ltd.*, 984 F.2d 135, 137 (5th Cir. 1993), *vacated*, 993 F.2d 56. (App. 45) Specifically, the Fifth Circuit held that the District Court erred in not granting summary judgment in favor of Honda because the subject motorcycle's alleged defects were open and obvious as a matter of law, thereby precluding both recovery by Respondent under the "consumer expectations" analysis and submission of the case to a jury. *Id.* at 136-7.

Respondent subsequently moved the Fifth Circuit for rehearing and reconsideration of its decision to vacate the District Court's judgment, and during the pendency of

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[3] The jury verdict was reduced in the amount of a previously approved settlement between Respondent and the driver of the LTD automobile that he struck.

Respondent's motion, the Mississippi Supreme Court handed down *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993). In *Prestage*, the Mississippi Supreme Court affirmed the proper test for evaluation of a product's defectiveness under Mississippi product liability law to be the "risk-utility" analysis, specifically rejecting the "consumer expectations" analysis. *Id.* at 253. The Mississippi Supreme Court further stated that "risk-utility" had been the law in Mississippi since 1987, *id.*, and that federal courts sitting in diversity in Mississippi had been consistently misconstruing the law to be "consumer expectations" for at least as long, *id.* at 256. Because the Fifth Circuit recognized that the Mississippi Supreme Court's pronouncement in *Prestage*, as well as recently enacted Mississippi legislation, had the potential to significantly alter Mississippi product liability law, the Fifth Circuit vacated its dismissal and remanded the case to the District Court for further proceedings. *Satcher v. Honda Motor Co., Ltd.*, 993 F.2d 56 (5th Cir. 1993). (App. 51)

Upon reconsideration, the District Court concluded in its Memorandum Opinion and Order on Remand that *Prestage*'s destruction of the open and obvious bar to liability rendered summary judgment in favor of Honda incorrect. *Satcher v. Honda Motor Co., Ltd.*, 855 F. Supp. 886, 893 (S.D. Miss. 1994). (App. 65-6) The District Court further determined that Honda was not entitled to a new trial, even though the jury was not instructed on the applicable Mississippi product liability law, because the "consumer expectations" instruction presented a "stricter test" for Respondent than the "risk-utility" standard would have. *Id.* at 896. (App. 75)

Honda again perfected an appeal to the United States Court of Appeals for the Fifth Circuit, arguing, among other things, that the District Court should have granted a new trial in order to allow the jury to consider Respondent's claims under the "risk-utility" analysis as it was clarified by the Mississippi Supreme Court in *Prestage*. In its opinion dated May 30, 1995, a majority of the Fifth Circuit Panel affirmed the District Court's decision denying a new trial and affirming Respondent's compensatory damages award. *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1318 (5th Cir. 1995). (App. 7) Recognizing that it was "not in a position to contradict the Mississippi Supreme Court's own conclusion . . . that [*Prestage*] did not change Mississippi law," *id.* at 1314 (App. 5), the Fifth Circuit Panel majority held that a retrial of the case was not necessary, reasoning that "[s]ince the jury found for [Respondent] on [the issue of consumer expectations], it is immaterial whether the utility of the motorcycle without guards would weigh less than that danger," *id.* at 1315 (App. 7). Judge Barksdale wrote separately to dissent from the refusal to grant a new trial, reasoning that the majority's conclusion "that the jury's finding on consumer expectations trumps, even under the risk-utility analysis . . . runs contrary to even the minimal guidance offered by *Prestage*." *Id.* at 1319. (App. 19-20)

Honda filed a timely Suggestion for Rehearing En Banc and Respondent filed a Petition for Panel Rehearing. The Fifth Circuit denied both requests on July 24, 1995, and subsequently issued its mandate based on the May 30, 1995 judgment.

REASONS FOR GRANTING THE PETITION

This Court should grant Honda's petition for a writ of certiorari because the decision of the United States Court of Appeals for the Fifth Circuit Panel majority affirming the District Court's award of compensatory damages in favor of Respondent and denying Honda's request for a new trial, despite the fact that the jury had not been charged with the correct substantive product liability law of the State of Mississippi, is in hopeless conflict with this Court's decision in *Erie R.R. Co. v. Tompkins*. The questions presented by this case are important insofar as the Fifth Circuit Panel majority's decision violated the due process rights guaranteed Honda by the Fifth Amendment of the United States Constitution. Moreover, the decision of the Fifth Circuit Panel majority is erroneous and constitutes a sanction of such a departure by the District Court from accepted judicial principles that an exercise of this Court's supervisory powers is warranted.

I. The Fifth Circuit Panel Majority's Refusal To Grant a New Trial in Light of the Mississippi Supreme Court's Approval of the "Risk-Utility" Analysis During the Pendency of Respondent's Motion for Rehearing Squarely Conflicts with the Decision of this Court in *Erie R.R. Co. v. Tompkins*.

This Court should grant certiorari to review the Fifth Circuit Panel majority's May 30, 1995 decision affirming the District Court's award of compensatory damages in favor of Respondent and denying Honda's request for a new trial because the Fifth Circuit Panel majority acted in contradiction of this Court's mandate in *Erie R.R. Co. v.*

Tompkins, 304 U.S. 64 (1938), that federal courts sitting in diversity ascertain and apply the accurate substantive law of the forum state. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200 (1956) (granting certiorari "because of the doubtful application by the Court of Appeals of *Erie R. Co. v. Tompkins*"). When this case was tried, the District Court instructed the jury that it was to apply a "consumer expectations" analysis in determining whether the subject Honda Nighthawk motorcycle was defective. Relying on binding Fifth Circuit precedent,[4] the parties requested that the District Court charge the jury with an instruction based on the "consumer expectations" analysis, which was the standard used by federal courts sitting in diversity in product liability cases being tried under the substantive law of the State of Mississippi. However, subsequent to the original Fifth Circuit Panel's reversal and dismissal of the case, and during the pendency of Respondent's Motion for Rehearing, the Mississippi Supreme Court in *Sperry-New Holland v. Prestage*, 617 So.2d at 253, stated that Mississippi product liability law is based on a "risk-utility" analysis, not a "consumer expectations" analysis. *Prestage* alerted the Fifth Circuit to its consistent misapplication of Mississippi product liability law, and specifically to its misapplication of Mississippi law in this case. *Satcher*, 52 F.3d at 1314. (App. 5) Based on *Prestage* and other post-trial developments in Mississippi substantive product liability law, the Fifth Circuit Panel majority's failure to remand this case for retrial simply cannot be reconciled with *Erie*.

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[4] *See, e.g., Melton v. Deere & Co.*, 887 F.2d 1241, 1243 (5th Cir. 1989); *Gray v. Manitowoc Co.*, 771 F.2d 866 (5th Cir. 1985).

When this Court decided *Erie R.R. Co. v. Tompkins* nearly sixty years ago, one of its major concerns was that the *Swift v. Tyson* doctrine worked to prevent a state from establishing uniformity of laws within its borders. 304 U.S. at 75. Since then, this Court has made it clear that the now axiomatic "*Erie* rule" is grounded in the notion that a federal court sitting in diversity provides an impartial forum, not a set of legal rules different from that of the forum state:

> In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court.

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945). *See also Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103 (1939); *Ruhlin v. New York*, 304 U.S. 202 (1938). Thus, it is clear that in this case, the Fifth Circuit Panel majority's decision to affirm the District Court's compensatory damage award and to refuse to remand for a new trial violated both the letter and the spirit of *Erie*. According to the Mississippi Supreme Court in *Prestage*, Mississippi product liability law has incorporated the "risk-utility" analysis for use in determining whether a product is defective since 1987. *Prestage*, 617 So.2d at 248. The Mississippi Supreme Court was also careful to point out that the Fifth Circuit, in consistently applying the "consumer expectations" analysis in Mississippi diversity cases, had consistently been applying the wrong analysis.

Id. at 254. Regardless of the reason underlying the Fifth Circuit's steady misapplication of the law of the State of Mississippi,[5] that misapplication had resulted in the existence of two very distinct rules governing the issue of whether a product is defective in Mississippi – the "risk-utility" analysis was applicable in Mississippi state courts and the "consumer expectations" analysis was controlling in federal courts sitting in diversity in Mississippi. The Fifth Circuit Panel majority had a duty to correct that situation in this case in light of the fact that *Satcher v. Honda Motor Co, Ltd.* was still before the Court when the *Prestage* decision was announced. The Fifth Circuit Court of Appeals was bound by *Erie* to insure that the correct substantive law was charged to the jury; however, the Fifth Circuit majority failed to do so when it affirmed the compensatory damage award rendered in favor of Respondent by a jury acting under an erroneous "consumer expectations" charge.

Honda's assertion that the Fifth Circuit was bound to remand this case for a new trial incorporating a "risk-utility" instruction is bolstered by this Court's expansion of the *Erie* doctrine in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). In *Vandenbark*, this Court held that a federal court of appeals hearing a case grounded in diversity jurisdiction is bound to follow the substantive

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[5] *See Batts v. Tow-Motor Forklift Co.*, 153 F.R.D. 103, 106 (N.D. Miss. 1994) ("On [the date *Prestage* was decided], the Mississippi Supreme Court let the rest of the world in on the best kept secret in Mississippi jurisprudence.").

law of the forum state as it exists at the time of the appeal, regardless of how inconvenient that duty may be:

> *While not insensible to possible complications*, we are of the view that, until such time as a case is no longer sub judice, the duty rests upon federal courts to apply state law . . . in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the *confusion and injustices arising from inconsistent federal and state interpretations of state law.*

Id. at 543 (emphasis added). Notwithstanding the Mississippi Supreme Court's statement that its decision did not render an actual "change" in Mississippi product liability law, *Prestage*, 617 So.2d at 253, it is undisputable that the decision so profoundly altered the Fifth Circuit's understanding of Mississippi law that, for all practical purposes, *Prestage* rendered Fifth Circuit precedent moot, thereby transforming the substantive law applicable to this case. Thus, the Fifth Circuit was under a duty to remand this case for a new trial, and, in light of *Prestage*, the failure of the panel majority to do so is in direct conflict with the rule of law propounded by this Court in *Erie* and later expanded in *Vandenbark* that state substantive law be applied "in accordance with the then controlling decision of the highest state court." *Vandenbark*, 311 U.S. at 543.[6]

In reaching its decision, the Panel majority correctly recognized that it could not speculate about what a jury

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[6] *See, e.g, Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162 (5th Cir. 1992); *Melton v. Deere & Co.*, 887 F.2d 1241 (5th Cir. 1989) (Reavley, J., dissenting).

would do under a "risk-utility" charge. *Satcher*, 52 F.3d at 1314 n.2. (App. 4) Notwithstanding this acknowledgement, the two-judge majority proceeded to evaluate and affirm the jury's verdict of compensatory damages in favor of Respondent in the context of the "risk-utility" test. *Id.* at 1315. (App. 6-7) The Panel majority's effective substitution of its own reasoning for that of a properly instructed jury is not sufficient to harmonize this case with *Erie*, and this Court should not hesitate to grant Honda's petition for a writ of certiorari to correct the Fifth Circuit majority's failure to adhere to this Court's long-standing precedent.

Additionally, Respondent should not be heard to argue that the Fifth Circuit Panel majority did not act in contradiction of *Erie* because the distinction between the "consumer expectations" analysis and the "risk-utility" analysis is insufficient to justify a new trial, an argument which the Panel majority seemed to embrace. The majority of the Fifth Circuit Panel stated that it was "convinced that Mississippi courts would find nothing in this record to justify ordering plaintiff to retry his case ten years after his injury." *Id.* at 1314 n.2. (App. 4) The court reasoned that because the jury had apparently found that the ordinary consumer would not appreciate the danger presented by the subject Nighthawk motorcycle's lack of leg guards, "it is immaterial whether the utility of the motorcycle without guards would weigh less than that danger." *Id.* at 1315. (App. 7) However, as enunciated in *Prestage*, the consumer's expectation of a product's safety is now one of a number of factors to be considered by the jury

under a "risk-utility" analysis. The *Prestage* court specifically expanded on seven different factors to be considered by a trial court when applying the "risk-utility" analysis and balancing a product's utility against its risk:

> (1) The usefulness and desirability of the product – its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product – the likelihood that it will cause injury and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> **(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.**
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 1319 (emphasis added) (quoting *Prestage*, 617 So.2d at 256 n.3) (Barksdale, J., dissenting). (App. 18-9) Factor number (6), highlighted above, reflects the inclusion

under the "risk-utility" analysis of the consumer's expectation and the corollary open and obvious defense. Judge Barksdale's dissent from the majority's refusal to remand correctly notes that the majority's holding, which essentially allows consumer expectations to be determinative under the "risk-utility" test, "runs contrary to even the minimal guidance offered by *Prestage* . . . [wherein the Mississippi Supreme Court indicated that] *a consumer's awareness of the danger is but one factor to consider* in the risk-utility analysis." *Id.* at 1319-20 (emphasis added). Clearly, the "risk-utility" test that is the law of the State of Mississippi is substantially different from the "consumer expectations" test on which the jury was instructed in this case.[7] A verdict under the "consumer expectations" test cannot reasonably be understood to be an appropriate finding of fact to support a verdict under the "risk-utility" analysis.

The Fifth Circuit Panel majority's affirmation of the District Court's compensatory damage award entered in favor of Respondent pursuant to a "consumer expectations" jury charge, together with the Panel majority's refusal to remand this case for a new trial, is in open conflict with the decisions of this Court in *Erie* and its progeny requiring that federal courts sitting in diversity ascertain and apply the correct substantive law of the forum state. This Court should accordingly grant Honda's petition for a writ of certiorari to review the Fifth Circuit Panel majority's opinion in this case.

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[7] The term "risk-utility" does not appear in any of the trial court's instructions to the jury. "Consumer expectations," however, appears on numerous occasions in the instructions given at trial.

II. The Fifth Circuit Panel Majority Violated Honda's Fifth Amendment Due Process Rights When It Affirmed the District Court's Award of Compensatory Damages in Favor of Respondent and Refused to Grant Honda's Request for a New Trial Because the District Court's Award Was Not Based on the Substantive Law of the Forum State.

This Court should issue a writ of certiorari to review the Fifth Circuit Panel majority's affirmance of the District Court's award of compensatory damages and denial of Honda's request for a new trial because the Fifth Circuit Panel majority effectively violated the due process rights guaranteed Honda under the Fifth Amendment of the United States Constitution.[8]

Honda, as a federal court litigant, is assured by the Fifth Amendment of the United States Constitution that it will not "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. While the phrase "due process" is not readily subject to concise definition, this Court has made it clear that "due process" commands "fundamental fairness." *See, e.g., Lassiter v.*

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[8] Honda has adequately preserved its due process argument for consideration by this Court insofar as due process was raised by Honda in its appeal to the United States Court of Appeals for the Fifth Circuit. Brief of Defendants-Appellants Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R&D Co., Inc., Civil Action No. 1:87-CV-635PR, Appeal from the United States District Court for the Southern District of Mississippi, Southern Division. *See, e.g., United States v. Williams*, 504 U.S. 36 (1992) (noting that traditional Supreme Court rule precludes a grant of certiorari only where "the question presented was not pressed or passed upon below").

Department of Social Servs., 452 U.S. 18, 25 (1981). Fundamental fairness, at a minimum, entitles a litigant in federal court where jurisdiction is based on diversity of citizenship to have its claim adjudicated pursuant to a correct statement of the applicable substantive state law. *See Allstate Ins. Co. v. Hague*, 499 U.S. 302, 312-13 (1981) (stating that in order for a litigant to be subjected to a particular forum's law, there must be a significant contact such that application of that forum's law is neither arbitrary nor fundamentally unfair). In 1928, in the process of determining whether a New York garnishment statute ran afoul of the Fourteenth Amendment, this Court recognized that due process requires that judicial proceedings be conducted in accord with an accurate statement of the applicable substantive law:

> The words "due process of law," when applied to judicial proceedings, "mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." They require a proceeding which, observing the general rules thus established, *follows forms of law appropriate to the case and just to the parties to be affected;* and which, whenever it is necessary for the protection of the parties, gives them an opportunity to be heard regarding the justice of the judgment.

Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285, 288 (1924) (emphasis added) (citations omitted) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878)). *See also Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701 (1884). Likewise, this Court again recognized that due process is

inextricably linked to the substantive law to which a civil defendant is subjected when it decided *International Shoe*:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. . . . [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the *benefits and protection* of the *laws of that state.*

International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (emphasis added).

In affirming the District Court's compensatory damage award and refusing to remand this case for a new trial, the Fifth Circuit Panel majority violated Honda's Fifth Amendment due process right to have this case adjudicated based on law bearing a reasonable connection to the activities of Honda in the State of Mississippi. The Fifth Circuit Panel majority recognized in its opinion that the compensatory damage award had been made under an incorrect statement of Mississippi product liability law. *See Satcher*, 52 F.3d at 1314. (App. 6) Nevertheless, the Panel majority, in denying Honda a new trial, effectively dismissed the "risk-utility" rule as "immaterial." *Id.* at 1315. (App. 7) The majority's assumption that Respondent would necessarily win under the "risk-utility" analysis because he won under the "consumer expectations" analysis is simply unfounded and amounts to a grave miscarriage of justice.

In *Ziegler v. Kawasaki Heavy Indus., Ltd.*, 539 A.2d 701 (Md. Ct. Spec. App. 1988), the Maryland Court of Special Appeals affirmed the trial court's judgment in favor of

defendant under a "risk-utility" analysis notwithstanding the deadlocked jury's failure to reach a decision. The *Ziegler* plaintiff claimed that a motorcycle manufactured by the defendant was defective because it did not have leg guards, and the appellate court reasoned that the defendant was entitled to judgment because the plaintiff's evidence failed to demonstrate that the risk posed by the motorcycle without the leg guards was greater than the risk posed by the motorcycle with the leg guards. *Id.* at 627. *See also* W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 Am. U. L. Rev. 573, 579 (1990) (recognizing that under the "risk-utility" test, a product is not necessarily defective if it does not meet consumer expectations). Absent review by this Court, the violation of Honda's Fifth Amendment due process right will go unremedied; Honda will be left in the fundamentally unfair position of being subject to a judgment of over one million dollars entered on a jury verdict that was not based on the applicable substantive law of the forum state.

The injustice of the Fifth Circuit Panel majority's decision to affirm Respondent's compensatory damage award and to deny Honda's request for a new trial is compounded by the fact that the Fifth Circuit Panel majority not only knowingly failed to apply the correct substantive law ("risk-utility"), but also erroneously applied the incorrect law ("consumer expectations"), thereby leaving Honda virtually defenseless. Under the "consumer expectations" test, the first Fifth Circuit Panel held that Respondent's claim was barred as a matter of law because the alleged defects in the subject motorcycle were open and obvious and that Respondent's claim

should never have been submitted to the jury. *Satcher*, 984 F.2d at 136-37. (App. 45) Because of the intervening *Prestage* decision, the Fifth Circuit vacated its first Panel decision and remanded this case for further consideration. *Satcher*, 993 F.2d at 56. (App. 51) On remand, the District Court again entered judgment on the jury's verdict and denied Honda's request for a new trial. On subsequent appeal under the "risk-utility" analysis, a majority of the second Fifth Circuit Panel affirmed the District Court's compensatory damage award and denial of a new trial, reasoning that because the Mississippi Supreme Court in *Prestage* had held that the open and obvious defense was not a complete bar to recovery by a product liability plaintiff, Respondent's claim had properly been submitted to the jury. *Satcher*, 52 F.3d at 1314. The Panel majority further reasoned that Honda was not entitled to a new trial because the "consumer expectations" charge under which the jury had reached its verdict was a "stricter" test for Respondent than the "risk-utility" test would have been. *Id.* What this decision fails to recognize is that the *Prestage* court did not merely hold that the open and obvious defense is no longer a bar to a product liability plaintiff's recovery in Mississippi. Rather, the Mississippi Supreme Court held in *Prestage* that the "patent danger" rule is unavailable in Mississippi because it goes hand-in-hand with the "consumer expectations" analysis and is incompatible with Mississippi's "risk-utility" rule:

> Having here reiterated this Court's adoption of a "risk-utility" analysis for products liability cases, we hold, necessarily, that the "patent danger" bar is no longer applicable in Mississippi.

> Under a "risk-utility" analysis, the "patent danger" rule does not apply. In "risk-utility," the openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous.

Prestage, 617 So.2d 256 n.4.

It was manifest injustice for the Fifth Circuit Panel majority to affirm the District Court's award of compensatory damages in favor of Respondent and refuse to remand this case for retrial because the net result of the decision was to subject Honda to an incorrect rule of law that was also stripped of its most efficacious defense. When this case was first heard on appeal under the "consumer expectations" analysis, the Fifth Circuit dismissed Respondent's claim and reversed the judgment on the jury's verdict as erroneous. However, when this case reached the Fifth Circuit on appeal for the second time, the Panel majority affirmed under the "risk-utility" analysis that same compensatory verdict earlier declared erroneous under the "consumer expectations" standard. In effect, the Fifth Circuit Panel majority affirmed an erroneous compensatory judgment rendered under an erroneous statement of substantive state law by elevating a single component of the correct substantive law to a determinative status, even though the complete multi-factor analysis of the correct substantive law was never given to nor considered by the jury.

Honda's Fifth Amendment due process rights were violated when the Fifth Circuit Panel majority affirmed the District Court's entry of judgment on a jury verdict rendered on a fundamentally incorrect substantive law

charge. The Fifth Amendment guarantees all civil defendants that federal courts sitting in diversity will correctly apply the substantive law of the forum state, thereby ensuring those defendants that they will not arbitrarily be subjected to laws bearing no relation to the activities in the forum state. Given the magnitude of the due process violation in this case, this Court should grant Honda's petition for a writ of certiorari to review the decision of the Fifth Circuit Panel majority affirming the District Court's compensatory damage award in favor of Respondent and refusing to grant Honda's motion for a new trial.

III. The Fifth Circuit Panel Majority Sanctioned an Egregious Departure from the Accepted and Usual Course of Judicial Proceedings by the District Court and Committed Clear Error When it Affirmed the District Court's Award of Compensatory Damages in Favor of Respondent and Refused to Grant Honda's Request for a New Trial.

This Court should grant Honda's petition for a writ of certiorari to review the Fifth Circuit Panel majority's decision affirming the District Court's award of compensatory damages to Respondent and denying Honda's request for a new trial in light of *Prestage* because the majority sanctioned such a radical departure from the accepted and usual course of judicial proceedings by the District Court that an exercise of this Court's supervisory power is required. *See* Sup. Ct. R. 10(a) (1995). Furthermore, the refusal of the Fifth Circuit majority to remand this case for a new trial in light of *Prestage* is clearly erroneous.

This Court should not hesitate to exercise its supervisory powers in this case because when the Fifth Circuit Panel majority affirmed the District Court's compensatory damage award and refused to remand this case for a new trial, it sanctioned an egregious departure by the District Court from accepted judicial practice and proceedings. *See, e.g., McNabb v. United States*, 318 U.S. 332, 340 (1984) (recognizing that this Court's scope of review of federal courts is not limited to mere constitutionality of action). There is absolutely no question that a federal district court sitting in diversity has but one acceptable course of action when instructing the jury – the court must instruct the jury as to the correct substantive law of the forum state. *Erie*, 304 U.S. at 75. In this case, the District Court, relying on Fifth Circuit precedent, failed to correctly instruct the jury on Mississippi law. The Court's reliance on Fifth Circuit misinterpretation may, in and of itself, be excusable. However, the District Court's subsequent entry of judgment on the misinstructed jury's verdict and refusal to grant a new trial after the Mississippi Supreme Court made it clear in *Prestage* that the Fifth Circuit "consumer expectations" precedent was wrong was an absolute breach of judicial protocol. In accord with established judicial procedure, the District Court should have granted Honda's request for a new trial wherein the jury would be properly instructed on the applicable law. *See, e.g., Batts v. Tow-Motor Forklift Co.*, 153 F.R.D. 103 (N.D. Miss. 1994) (recognizing *Erie* duty to remand for new trial after *Prestage* where jury had originally been instructed on "consumer expectations"); *Heritage v. Pioneer Brokerage & Sales*, 604 P.2d 1059 (Alaska

1979) (remanding for new trial where jury was erroneously instructed on strict product liability); *White v. Caterpillar, Inc.*, 867 P.2d 100 (Colo. 1993) (remanding for new trial where jury was mistakenly instructed on "consumer expectations"). The Fifth Circuit majority's affirmance of the District Court's action in this case clearly calls for an exercise by this Court of its inherent power to supervise the federal judiciary.

In the past, this Court has exercised its power of review to correct plain error committed by lower federal courts where that error is flagrant and results in substantial prejudice to the litigants. *See, e.g., Florida v. Rodriguez*, 469 U.S. 1 (1984). The error committed by the Fifth Circuit Panel majority in this case is substantial. The Fifth Circuit majority affirmed the District Court's award of compensatory damages in favor of Respondent even though the jury had not been correctly instructed on Mississippi law, and the Panel refused to grant a new trial knowing that the substantive law of the forum state had not been applied as required by *Erie*. The Panel majority, therefore, essentially substituted its decision for that of a properly instructed jury. As a result of the Panel majority's affirmance of the District Court's erroneous actions, Honda has been held liable under a jury verdict that was not rendered pursuant to correct substantive Mississippi product liability law and has had its Fifth Amendment due process rights violated. This Court should grant Honda's petition for a writ of certiorari to review the Fifth Circuit Panel majority's error-laden decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

James C. SATCHER, Plaintiff-Appellee,
v.
HONDA MOTOR COMPANY, et al.,
Defendants-Appellants.
No. 94-60492.
United States Court of Appeals,
Fifth Circuit.
May 30, 1995.

Linda J. Hamilton Mowles, Lewis, King, Krieg & Waldrop, Knoxville, TN, Ronald G. Peresich, Page, Mannino & Peresich, Biloxi, MS, for appellants.

Peter K. Smith, Quitman, MS, Ray Ferrero, Jr., Joanne Fanizza, Ferrero & Middlebrooks, Wilton L. Strickland, Ft. Lauderdale, FL, Robert E. Arceneaux, Mack E. Barham, Barham & Arceneaux, New Orleans, LA, for appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

The manufacturer and seller of Honda motorcycles appeal for the second time[1] a judgment in favor of a rider who lost his leg in a collision between his motorcycle and

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[1] *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir.) (reversing and rendering in favor of Honda), *vacated*, 993 F.2d 56 (5th Cir.1993) (on petition for rehearing remanding to district court).

an automobile. His vehicle had no leg guards, an omission that plaintiff Satcher claims made the product defective and unreasonably dangerous in a crash. The district court's judgment enforces a jury verdict. We vacate the award of punitive damages and otherwise affirm.

BACKGROUND

Satcher sued three Honda companies (collectively Honda) and obtained a favorable jury verdict awarding him approximately $1 million in actual damages and $2 million in punitive damages. In the first appeal we held that under Mississippi law the recovery was barred because the alleged defect, the lack of leg guards, was open and obvious to the ordinary consumer. We reversed and rendered, reasoning that the case should have never gone to the jury and that the district court should have granted defendants' motion for summary judgment.

A few months after our first opinion, however, the Mississippi Supreme Court made clear that the Fifth Circuit's rule, that an open and obvious product defect could not be a ground for liability, was not Mississippi law. The Mississippi Legislature also enacted a new statute bearing on product liability. On rehearing, we vacated the prior opinion and remanded the case to the district court to address these new developments in Mississippi law.

The Mississippi case in question is *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss.1993). The court there approved a risk-utility analysis in products cases, and held that the trial court had not erred in applying that analysis rather than a consumer expectations analysis. The critical distinction for our purposes is that even if the

dangerousness of the product is obvious to a reasonable consumer, the plaintiff can still recover in some cases:

> In a "risk-utility" analysis, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates. Under the "risk-utility" test, either the judge or the jury can balance the utility and danger-in-fact, or risk, of the product.

Id. at 254. The court further made clear that the "patent danger" or "open and obvious" bar to recovery in products cases is not to be followed in Mississippi:

> Under the "patent danger" rule, "a product that has an open and obvious danger is not more dangerous than contemplated by the consumer, and hence cannot, under the consumer expectation test applied in Mississippi, be unreasonably dangerous." *Toney [v. Kawasaki Heavy Industries, Ltd.]* 975 F.2d [162] at 165 [(5th Cir.1992)] (quoting *Melton*, 887 F.2d at 1243).
>
> Having here reiterated this Court's adoption of a "risk-utility" analysis for products liability cases, we hold, necessarily, that the "patent danger" bar is no longer applicable in Mississippi. Under a "risk-utility" analysis, the "patent danger" rule does not apply. In "risk-utility," the openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous.

Id. at 256 n. 4. The court further held that Fifth Circuit cases applying the consumer expectations test had incorrectly applied Mississippi law. *Id.* at 256.[2]

The district court subsequently responded with a carefully written Memorandum Opinion and Order on Remand. The court pointed out that the new statute, MISS.CODE ANN. § 11-1-63, § 11-1-65, did not become effective until July 1, 1993 (procedural) and July 1, 1994 (substantive), too late to have any effect on the 1991 trial of the Satcher case. Moving to *Prestage*, the district court read that decision to fault the Fifth Circuit's view of Mississippi law but not to fault the trial court's submission in this case. While a risk-utility analysis would have been appropriate under *Prestage*, the defendant here requested the consumer expectations instruction that was given and the jury returned a verdict of unreasonable dangerousness. There being no error and no manifest injustice, the judgment was again entered on the verdict.

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[2] Some federal judges have had difficulty understanding Mississippi products liability law, including the meaning of comment i of the Restatement (Second) of Torts § 402A (re "consumer expectations"). See *Melton v. Deere & Co.*, 887 F.2d 1241, 1246 (5th Cir.1989) (Reavley, J., dissenting). No Mississippi law controlling this case is "in its infancy," as the dissent characterizes risk-utility submission.

As we emphasize below, the jury has found the product without leg guards to be unreasonably dangerous, and has also found that the ordinary consumer would not appreciate the danger. The majority will not speculate about what a new jury would decide, but we are convinced that Mississippi courts would find nothing in this record to justify ordering plaintiff to retry his case ten years after his injury.

DISCUSSION

A. The Impact of *Prestage*.

Honda argues that *Prestage* altered the analysis used in products cases, changing the focus away from consumer expectations for the product to whether the danger outweighs the utility of the product. Honda contends that the open and obvious nature of the danger is only one factor to consider, and that because the analysis now required is fundamentally different, Honda is entitled to a new trial. In effect, Honda argues that *Prestage* announced a new common law rule, and that new rule should be applied retroactively so as to afford Honda a right to a new trial.

Both the Mississippi Supreme Court and this court have held that *Prestage* did not change the law. *Prestage* concluded that in prior decisions the Mississippi Supreme Court "has clearly moved away from a 'consumer expectations' analysis and has moved towards 'risk-utility.' " 617 So.2d at 253. It purported to apply a risk-utility analysis adopted in earlier decisions. *Id.* at 253. On rehearing the first appeal in our case, we explained that *Prestage* held that "contrary to prior Fifth Circuit opinions and this panel's opinion in the instant case, Mississippi applies a 'risk-utility' analysis in products liability cases and has done so since 1987." 993 F.2d at 57. We are not in a position to contradict the Mississippi Supreme Court's own conclusion, as well as that of our own panel, that *Prestage* did not change Mississippi law. It is true, however, that from the perspective of the parties in this case *Prestage* has changed the Fifth Circuit's reading of Mississippi law in that the patent danger of a product is not a

bar to recovery. That change is not in Honda's favor, nor does it mean that Honda was prejudiced by the law under which this case was tried.

The Mississippi court has explained to us in *Prestage* that the risk-utility analysis of the danger of a product is the analysis to be used, rather than that of only consumer expectations. Again, this modification of our understanding of Mississippi law does not help Honda in this case, and it will not justify affording Honda a new trial. The modification adds strings to the bow of the plaintiff, not the defendant. In the words of the *Prestage* court:

> [E]ven if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates.

617 So.2d at 254.

In the trial of this case the jury was instructed that Satcher's product liability claim depended upon his proving that "the product was in a defective condition making it unreasonably dangerous to the user." It was then explained to the jury:

> A product is in a defective condition unreasonably dangerous to the user when it has a propensity or a tendency for causing physical harm beyond that which would be contemplated by the ordinary user having ordinary knowledge of a product's characteristics known to the foreseeable class of persons who would normally use the product.

Acting under that instruction, the jury found for Satcher, necessarily finding that the ordinary user would

not contemplate the full propensity or tendency of the lack of leg guards to cause physical harm. To be sure, users know that motorcycles are dangerous, and they know that the absence of leg guards might add to the chances of harm. This jury could find, however, that Honda's motorcycles were more likely to cost the rider a leg than the ordinary rider would contemplate. The evidence reflects experience with motorcycle injuries beyond the contemplation of the ordinary rider. Since the jury found for Satcher on this issue, it is immaterial whether the utility of the motorcycle without guards would weigh less than that danger. Satcher prevailed on the first step and need not be concerned with the second step, and a retrial to submit the second step cannot be justified.

B. Punitive Damages

The jury awarded and the district court entered judgment for punitive damages of $2 million. Honda asks that we reverse this award because applicable law and the evidence do not support it.

1. Preservation of Error

At the outset we address Satcher's argument that error was not properly preserved on this point. Satcher points out that Honda did not file a post-verdict motion for judgment under FED.R.CIV.P. 50(b). Rule 50(a) provides for the filing of a motion for judgment as a matter of law based on insufficient evidence prior to the submission of the case to the jury. Rule 50(b) provides for a

renewed motion (previously known as a motion for judgment notwithstanding the verdict or JNOV motion) after the verdict.

To fully preserve error on appeal for failure to grant a motion for judgment, the moving party must file both a pre-verdict Rule 50(a) motion at the close of all the evidence and the renewed Rule 50(b) motion. An appellant who failed to do so in the district court is not entitled to rendition of judgment in his favor on appeal, but is at most entitled to a new trial.[3]

Honda did, however, move for judgment as a matter of law on the issue of punitive damages at the close of the plaintiff's case and at the close of all the evidence. After the verdict Honda filed a motion styled a "motion for new trial," but it not only argued for a new trial but reurged the motion for judgment, and specifically argued that a directed verdict should have been granted on the claim for punitive damages.

Honda's noncompliance with the rule was little more than failing to style its motion correctly. We excuse technical noncompliance with Rule 50 where its basic purposes have been satisfied. *E.g., MacArthur v. University of Texas Health Center,* 45 F.3d 890, 896-98 (5th Cir.1995); *McCann v. Texas City Refining, Inc.,* 984 F.2d 667, 671 (5th Cir.1993) ("In the past, the Court has been willing to excuse certain 'de minimis' departures from technical compliance with Rule 50(b)."); *Bohrer v. Hanes Corp.,* 715

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[3] *Phillips v. Frey,* 20 F.3d 623, 627 (5th Cir.1994); *Zervas v. Faulkner,* 861 F.2d 823, 832 n. 9 (5th Cir.1988); *Smith v. Transworld Drilling Co.,* 773 F.2d 610, 615 (5th Cir.1985).

F.2d 213, 216-17 (5th Cir.1983), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). The basic purposes of the Rule are "to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit." *Bohrer*, 715 F.2d at 216. We conclude that these basic purposes were satisfied here and that error was therefore preserved under Rule 50.

2. Whether Satcher Is Entitled to Punitive Damages

Judgment as a matter of law is proper on an issue if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED.R.CIV.P. 50(a). In reviewing the denial of a motion for judgment, a jury verdict "must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary." *Western Co. of North America v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983).

The law of Mississippi allows punitive damages only in "extreme cases;" they "are not favored in the law and are to be allowed only with caution and within narrow limits." *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 & n. 1 (Miss.1983). "[T]here must be some element of aggression or some coloring of insult reflecting malice,

gross negligence, or ruthless disregard for the rights of others." *Illinois Cent. R.R. v. White*, 610 So.2d 308, 320 (Miss.1992). In regards to gross negligence, "punitive damages are ordinarily recoverable only in cases where the negligence is so gross as to indicate reckless or wanton disregard of the safety of others." *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So.2d 889, 894 (Miss.1992) (quoting *Belk v. Rosamond*, 57 So.2d 461, 468 (Miss.1952)).

Under these standards, we conclude that Satcher was not entitled to punitive damages. Evidence relevant to this inquiry – the dangers of a motorcycle lacking leg guards and Honda's knowledge of such dangers – can be summarized as follows. While police motorcycles have leg guards, all motorcycles marketed by all manufacturers to the general public lack them. Satcher's theory, therefore, was that Honda's conduct in marketing its products in the same design of every motorcycle marketed in the world to the general public was so extreme or outrageous as to justify punitive damages.

Motorcycle leg injuries are a common and serious problem of which Honda and the industry as a whole are aware. Leg injuries account for a significant percentage of all motorcycle injuries. The concept of protective leg guards on motorcycles has existed since the 1930's. A number of scientific studies, of which Honda is aware, have been conducted over the years regarding the efficacy of leg guards. A British physician, Dr. Bothwell, conducted some early tests in the 1960's. Two engineers, Arthur Ezra and Harry Peterson, received federal funding to conduct further tests at the Denver Research Institute (DRI). They both testified as experts for Satcher, and

were of the view that "robust" leg guards or a reinforced "fairing" should be available on motorcycles, and would have been effective in reducing Satcher's injuries. They believe that all motorcycles lacking leg guards are unreasonably dangerous products. An accident reconstruction expert, Dr. Fogerty, testified to the same effect. Ezra and Peterson worked with Dr. Bothwell on the DRI studies. Dr. Bothwell apparently disagrees with Ezra and Peterson, although the exact nature of the disagreement is not clear from the record.

"Conventional" leg guards or crash bars which are not as strong as Ezra and Peterson recommend are available in kits and are added to police motorcycles. Police crash bars are used in part to hold lights or other accessories needed on police vehicles. Their efficacy as a safety device is the subject of disagreement. Kenneth Harms, a former Miami police chief with experience on the motorcycle patrol and in investigating motorcycles [sic] accidents, believes that police crash guards, particularly those used on Harley-Davidson motorcycles, are effective in reducing injuries. Harms conceded that he had no scientific or engineering expertise in motorcycle design. Harley-Davidson has expressly recommended against the use of crash bars on its police motorcycles.

Although certain studies indicate that leg guards are effective, no government in the world has ever required them. No professional organization that reviews engineering safety standards, such as the Society of Automotive Engineers or the American National Standards Institute, has ever recommended leg guards. Ezra believes that the failure of the federal government to act on his own work was due to a deregulatory environment

in government during the Carter/Reagan years and pressure from the industry.

Honda presented two well-qualified experts, John Snider and Warner Riley, who opined that leg guards should not be used because their safety benefits are outweighed by their safety disadvantages, including the possibility of greater upper body injuries. For example, Riley explained that the problem with unpadded robust bars is that they can cause the cyclist to leave the motorcycle and land upside down, and that padded crash bars increase in-flight whiplash, which can result in a broken neck. They were also of the view that in this particular accident Satcher would not have benefitted from crash bars. There is a disagreement in the scientific community as to whether head impact increases when crash bars are used.

Honda itself conducted certain crash tests in the 1960's. One report concluded that at certain speeds crash bars are effective at reducing leg impact in an angled collision. However, it found that in broadside collisions "there seems to be an indication that each of the various body area impacts is greater in the case of motorcycles equipped with crash bars than in the case of those which are not," and that a commercially available crash bar "has no protective effect or it has a possible reverse effect in broadside collision[s]." This conclusion was disputed by Ezra as not supported by Honda's own experimental

data. The report also noted that it was far from definitive.[4] A Honda chief engineer testified that "thus far we have created, tested, evaluated various experimental devices; however, we have yet to come up with a . . . practical as well as effective device that would protect the leg."

Summarizing, the jury heard evidence that (1) there is a genuine dispute in the scientific community as to whether leg guards do more harm than good, (2) no government or agency thereof has ever required them, (3) no independent testing or professional organization has ever recommended them, (4) one of the original researchers on the problem who worked with two of plaintiff's experts disagrees with them, (5) the industry as a whole categorically rejects the need for leg guards, and (6) Honda's own testing on their use reached no definitive conclusions. On this record we hold that no reasonable jury could conclude under Mississippi law that this is an "extreme case" meriting punitive damages, or that Honda's conduct rose to [the] level of "malice, ruthless

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[4] It states in its preface:

> To judge the propriety of equipping motorcycles with crash bars, we must, as described later, have the cooperation of many other studies. The present test is by no means satisfactory; it is a mere fragment of the long-term test program extending over the future. Therefore, a definitive conclusion cannot be drawn from the present test results; however, our approach to the elucidation of effect of the crash bar is to be carried on for the improvement of motorcycle safety.

disregard or gross negligence" required for the imposition of such damages. We therefore vacate the award of punitive damages.

C. Evidentiary Rulings

Honda complains of several evidentiary ruling [sic] by the court. "Under [FED.R.EVID.] 103(a), appellate courts should reverse on the basis of erroneous evidentiary rulings only if a party's substantial rights are affected. Moreover, the party asserting error based on erroneous rulings bears the burden of proving that the error was harmful." *Carroll v. Morgan*, 17 F.3d 787, 790 (5th Cir.1994) (citation omitted).

Honda complains that Kenneth Harms (discussed above) should not have been allowed to testify as an expert on lower leg protection. "A trial court's ruling regarding admissibility of expert testimony is protected by an ambit of discretion and must be sustained unless manifestly erroneous." *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir.1991), *cert. denied*, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992). Honda argues that Harms is not an engineer; however FED.R.EVID. 702 allows that a witness may be qualified by "knowledge, skill, experience, training or education." The district court did not manifestly err in finding him qualified to testify as an expert. Among other qualifications, he was on the Miami police motor squad for approximately nine years, and has investigated hundreds of motorcycle accidents. Further, Honda does not demonstrate that its substantial rights were affected. Harms' testimony regarding leg guards was cumulative of the

testimony of three other experts on this subject, and he was thoroughly cross-examined regarding his lack of formal scientific and engineering training.

Honda next complains that the testimony of Ezra and Peterson regarding the severity of Satcher's injuries if a crash bar had been installed was speculative or lacking in scientific certainty. We fail to see any error here. Both experts were highly qualified. Both testified that with proper leg protection Satcher would not have lost his leg, and Ezra testified that he might have suffered no more than a bruise. The testimony was properly allowed.

Honda also complains that the court erred in not allowing its experts to change or modify at trial their opinions given in pretrial discovery that the accident occurred in Satcher's lane. The experts agreed before trial that the collision occurred in Satcher's lane, in part because an eyewitness and the police officer who investigated the accident had given statements supporting this conclusion. These two individuals then gave different testimony at trial, suggesting that the collision might have occurred in the automobile's lane. The district court reasoned that it would be unfair to allow the experts to change their testimony after discovery. Honda argues that this issue is relevant to Satcher's contributory negligence and assumption of the risk. While the lane in which the accident occurred is certainly relevant to contributory negligence, Honda fails to show that its substantial rights were affected. The jury heard from Satcher, the eyewitness and the police officer at trial. The jury hardly needed expert testimony to explain that driving in the wrong lane of traffic is negligent. As to the question of which lane the accident occurred, Honda fails to explain how

expert testimony would have significantly bolstered or discredited the testimony of the lay witnesses.

Finally, Honda complains that the district court erred in failing to submit a jury issue on assumption of risk. The court did submit instructions on contributory negligence. In *Braswell v. Economy Supply Co.*, 281 So.2d 669, 677 (Miss.1973), the Mississippi Supreme Court held that where contributory negligence and assumption of risk overlap and coincide, the defense of contributory negligence applied. "If the circumstances show that the plaintiff may have assumed the risk but also indicate that the plaintiff may have been negligent without assuming the risk, then the two doctrines overlap, and only the comparative negligence instruction should be given." *Richardson v. Clayton & Lambert Mfg. Co.*, 657 F.Supp. 751, 754 (N.D.Miss.1987). The court did not err in refusing to submit the assumption of risk instruction.

The award of punitive damages is vacated and in all other respects the judgment is affirmed.

AFFIRMED IN PART, VACATED IN PART.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting in part and concurring in part:

"Spur not an unbroken horse; put not your plowshare too deep into new land." Sir Walter Scott, The Monastery [1820]. Answer of the Author of Waverley to the Letter of Captain Clutterbuck, ch. 25. Even though this matter is governed by entirely new ground rules, the majority refuses to remand it for a new trial. Accordingly, I respectfully dissent from that part of its opinion (part A; "The Impact of Prestage"); in all other respects, I concur.

The Mississippi Supreme Court's fairly recent holding in *Sperry-New Holland v. Prestage*, 617 So.2d 248, 253-56 (Miss.1993), that "risk-utility", rather than "consumer expectations", is, and has been since 1988, the relevant analysis for Mississippi strict product liability was, to say the least, most unexpected.[1] *See, e.g. Batts v. Tow-Motor Forklift Company*, 153 F.R.D. 103, 106 (N.D.Miss.1994) (observing that with *Prestage*, "the Mississippi Supreme Court let the rest of the world in on the best kept secret in Mississippi jurisprudence"). But, *Prestage* provided only a broad statement of the law of Mississippi; and, for the reasons set forth below, I cannot join in the majority's application of this analysis, still in its infancy in Mississippi, to justify not holding a new trial.

The majority has concluded that a new trial is not justified, apparently because Honda would have no reasonable chance of success under the risk-utility analysis. I cannot agree. To date, there are no published cases in Mississippi either applying, or further defining, the *Prestage* analysis.[2] This alone gives pause to the majority's

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[1] The author of the majority opinion is one of the few who previously questioned Mississippi's adherence to the consumer expectations test. *See Melton v. Deere & Co.*, 887 F.2d 1241, 1246-47 (5th Cir.1989) (Reavley, J., dissenting).

[2] Not only are there no cases expounding *Prestage*, there are also no Mississippi cases detailing the analysis of the cases on which *Prestage* relied: *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss.1988), and *Hall v. Mississippi Chemical Exp., Inc.*, 528 So.2d 796 (Miss.1988). Indeed, one court has observed that between 1988, when Mississippi is said to have adopted the risk-utility analysis, and 1993, when *Prestage* was decided, at least one Mississippi Supreme Court case implied that the consumer expectations test was still applicable. *See Batts*, 153 F.R.D. at

conclusion that Honda would necessarily lose under risk-utility. Furthermore, to the extent *Prestage* can be clearly understood, I am troubled by the majority's application.

As stated in *Prestage*, the proper inquiry in Mississippi for a strict product liability claim is whether "the danger-in-fact . . . outweighs the utility of the product". 617 So.2d at 254. But, the Mississippi Supreme Court provided little, if any, guidance for making this inquiry, stating only that, "[i]n balancing a product's utility against the risk of injury it creates, a trial court may find it helpful to refer to the seven factors enumerated in Professor John Wade's article, On the Nature of Strict Tort Liability for Products, 44 Miss.L.J. 825." *Id.* at 256 n. 3 (emphasis added). Those factors are:

(1) The usefulness and desirability of the product – its utility to the user and to the public as a whole.

(2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

108-09 (citing *Kussman v. V & G Welding Supply, Inc.*, 585 So.2d 700, 703-04 (Miss.1991)).

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. The majority seems to have found one of the above factors, number six, to be dispositive, stating:

Acting under [a consumer expectations] instruction, the jury found for Satcher, necessarily finding that the ordinary user would not contemplate the full propensity or tendency of the lack of leg guards to cause physical harm. . . . Since the jury found for Satcher on this issue [consumer expectations], it is immaterial whether the utility of the motorcycle without guards would weigh less than that danger. Satcher prevailed on the first step and need not be concerned with the second step, and a retrial to submit the second step cannot be justified.

By the foregoing, I understand the majority to conclude that the jury's finding on consumer expectations trumps, even under the risk-utility analysis.[3] This runs

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[3] It seems more than somewhat anomalous to give credence to the jury's verdict for Satcher under the consumer expectations test, when, on appeal from that verdict, our court found that, under this (consumer expectations) analysis, Honda was entitled to judgment as a matter of law; accordingly, we reversed and rendered judgment for Honda. *Satcher v. Honda Motor Co., Ltd.*, 984 F.2d 135, 138 (5th Cir.), *vacated*, 993 F.2d 56

contrary to even the minimal guidance offered by *Prestage*.

In light of the seven factors suggested by *Prestage*, a consumer's awareness of the danger inherent in a product is but one factor to consider in the risk-utility analysis. *See also Prestage*, 617 So.2d at 256 n. 4 (rejection of "patent danger" rule). Moreover, *Prestage* held that foreseeability of danger was not dispositive: "In determining whether a product is unreasonably dangerous a reasonable person must conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product." *Id.* at 255. (emphasis added) (quoting *Whittley v. City of Meridian*, 530 So.2d 1341, 1347 (Miss.1988)).[4]

(5th Cir.1993). Our court vacated its opinion, not because of a change of heart regarding Honda's entitlement to judgment under the consumer expectations analysis, but because *Prestage* revealed that consumer expectations was no longer the test in Mississippi. *Satcher*, 993 F.2d at 57-58.

[4] *Prestage* reads:

> In a "risk-utility" analysis, a product is "unreasonably dangerous" if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product. Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates.

Id. at 254 (emphasis added). The *Prestage* court made this statement as a comparison between risk-utility and consumer expectations – noting that, with risk-utility, unlike consumer expectations, the plaintiff does not automatically lose only because he "appreciates the danger of a product". Of course, the court did not mean that the opposite was true. *See Id.* at 254, 255 n. 3 & 4.

Rightfully so, the majority does not undertake to predict the outcome in this case when all of the suggested factors for risk-utility analysis are applied. With almost no guidance on risk-utility from the Mississippi courts, we cannot forecast how a jury might weigh the factors and evidence here. The majority notes correctly that the risk-utility analysis "adds strings to the bow of the plaintiff, not the defendant" but, as noted, a panel of this court held that, as a matter of law, Honda prevailed under the consumer expectations analysis, and that holding was vacated only because *Prestage* signaled that consumer expectations was no longer the test in Mississippi. *See* note 3, *supra*. To hold now that Honda necessarily loses is a leap I cannot take.

The risk-utility analysis hardly leaves Honda with no "strings in its bow". For instance, perhaps it could make a case for the high utility of motorcycles in general. For another example, and as to the design at issue, Honda offered evidence that the addition of leg guards, although offering greater protection against the injury suffered by Satcher, might actually increase the likelihood of fatal injury – an obvious important factor in a risk-utility analysis. Does this mean Honda will prevail? I would not – and, indeed, cannot – hazard a guess. I note only the obvious: the ground rules have changed dramatically in Mississippi, and those rules have yet to be defined with any precision. As such, I cannot agree with the majority that it would be unjustified to permit the parties to present their cases to the jury under the proper legal standard. To the contrary, in my opinion, justice requires it.

Accordingly, I must regretfully, but most respectfully, dissent.

APPENDIX B

JAMES C. SATCHER, PLAINTIFF, v. HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC. AND HONDA RESEARCH AND DEVELOPMENT CO., LTD., DEFENDANTS

SATCHER v. HONDA MOTOR CO.

Civil Action No. S87-0635(P)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

758 F. Supp. 393; 1991 U.S. Dist. LEXIS 9649

February 5, 1991, Decided
February 5, 1991, Filed

JUDGES: Charles W. Pickering, Jr., United States District Judge.

OPINION BY: PICKERING

OPINION: MEMORANDUM OPINION AND ORDER

CHARLES W. PICKERING, JR., UNITED STATES DISTRICT JUDGE

This matter is before the Court on a products liability claim filed against American Honda Motor Co., Inc., Honda Motor Co., Ltd. and Honda R & D Co., Ltd. (hereinafter referred to as the Honda Defendants). The Honda Defendants have filed a motion for summary judgment. The Court being fully advised in the premises finds as follows:

FACTUAL BACKGROUND

On March 18, 1985, the Plaintiff, James C. Satcher, purchased a red 1984 Honda 650 SC Nighthawk Motorcycle from Meridian Oxygen Service, Inc. and Honda of Meridian. The motorcycle was designed by Honda R & D Co., Ltd., manufactured by Honda Motor Co., Ltd. and distributed by American Honda Motor Co., Inc.

On October 15, 1985, at approximately 5:30 p.m. in the afternoon the Plaintiff, while riding his motorcycle, was involved in an accident with Fannie Fagan of Stonewall, Mississippi, who was driving a 1976 Ford LTD. The weather on the day of the accident was cloudy, but the road was dry. Just prior to the accident, Plaintiff was westbound on River Road as Fannie Fagan approached in her Ford LTD going eastbound in the same vicinity. The Plaintiff has testified that he observed the Fagan automobile approximately a quarter of a mile away. Fagan has testified by deposition that she first saw the Plaintiff from a distance and thought it was a child playing in the road. Fagan said that she did not recognize it as being a motorcycle until the accident was imminent at which time she looked in her rear view mirror, applied her brakes and for some unexplained reason, turned her car into Plaintiff's lane of traffic. Fagan was either stopped or barely moving at the time of the impact. The impact between Mrs. Fagan's vehicle and the Plaintiff's motorcycle occurred when the left side of the Plaintiff's motorcycle collided with the left front bumper and hood of Mrs. Fagan's automobile. Plaintiff's lower left leg was amputated by the impact and Plaintiff was thrown from the motorcycle. Plaintiff was traveling at a speed of 40 to 45 miles per hour at the time of the collision with the Fagan vehicle.

At the time of the impact, Plaintiff's motorcycle headlights were on as they were designed to turn on when the engine is turned on. Apparently, the automatically burning headlight is the only standard generally adopted throughout the motorcycle industry to ensure conspicuousness.

Plaintiff alleges that the motorcycle upon which he was riding was defectively designed because it was unreasonably dangerous to the Plaintiff and specifically that the motorcycle should have been equipped with appropriate leg protective devices that would have minimized or eliminated the Plaintiff's injuries in the accident without causing or enhancing any other types of injuries to the Plaintiff. Plaintiff also alleges a lack of conspicuousness of the motorcycle which was a defect and made the motorcycle unreasonably dangerous to him. Plaintiff predicates Defendants' liability for a defective product on the theories of negligence, strict liability and breach of warranty.

CONCLUSIONS OF LAW

The Federal Rules of Civil Procedure Rule 56(c) authorizes summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). However, a summary judgment proceeding does not provide a very satisfactory approach in most tort cases. *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). Citing *Williams v. Chick*, 373 F.2d 330

(8th Cir. 1967). It is rare to find an appropriate case for summary judgment involving negligence or products liability. *Powe v. Wagner Electric Sales Corporation*, 589 F.Supp. 657 (S.D.Miss. 1984), citing *Davidson v. Stanadyne, Inc.*, 718 F.2d 1334, 1338 (5th Cir. 1983).

Jurisdiction in this action is based on diversity of citizenship and, therefore, we are *Erie* bound to apply the products liability law of the State of Mississippi. *Erie R. Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

This case is a matter of first impression for this jurisdiction. The Plaintiff's Complaint embodies the emerging concept known as crashworthiness of a vehicle. Mississippi has only just recently accepted the notion of crashworthiness, or enhanced injuries through a second impact, where the alleged defect in an automobile's design or manufacture did not proximately cause or proximately contribute to the collision itself. *Toliver v. General Motors Corporation*, 482 So.2d 213 (Miss. 1985). This case overruled *Walton v. Chrysler Motor Corp.*, 229 So.2d 568 (Miss. 1969), and all the subsequent cases based on *Walton*. The cornerstone of the manufacturer's duty to adequately design his vehicle is found in the foreseeability of injury resulting in normal use of the product. Automobile accidents occur with sufficient frequency to be foreseeable to manufacturers. *Toliver supra* at 214, and cases cited thereunder. The *Toliver* court recognized that automobile manufacturers have a legal duty to design vehicles that are not unreasonably dangerous to the user. The question presented to this Court is whether the Mississippi Courts would extend the reasoning of *Toliver* to cover the manufacturer of a motorcycle.

The crashworthiness doctrine was first adopted in the seminal case of *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). Many of the jurisdictions that have adopted the crashworthiness doctrine since *Larsen* have followed the 8th Circuit's reasoning in this area of the law. The 8th Circuit stated:

> The duty of reasonable care in design should be viewed in light of the risk. While not all risks can be eliminated nor a crash proof vehicle be designed under the present state of the art, there are many common sense factors in design, which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision.

Courts that accept the crashworthiness doctrine for automobiles have also applied the same concept to motorcycles. *Nicolodi v. Harley-Davidson Motor Co.*, 370 So.2d 68 (Fla.App. 2d 1979); *Taylor v. American Honda Motor Co.*, 555 F.Supp. 59 (M.D. Fla. 1982); *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987), *cert. dismissed Honda Motor Co. v. Camacho*, 485 U.S. 901, 99 L.Ed.2d 229, 108 S.Ct. 1067 (1988); *Robbins v. Yamaha Motor Corp.*, 98 F.R.D. 36 (M.D. Pa. 1983); *Cota v. Harley-Davidson, Div. of AMF, Inc.*, 141 Ariz. 7, 684 P.2d 888 (App. 1984); *Stueve v. American Honda Motors Co.*, 457 F.Supp. 740 (D.Kan.1978); *O'Donnell v. Casper*, 696 P.2d 1278 (Wyo.1985); *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973); *Cornier v. Spagna*, 101 A.D.2d 141, 475 N.Y.S.2d 7 (1st Dept. 1984).

The Defendants argue that the *Larsen* case and its progeny have carved the crashworthiness doctrine out of a duty placed on the manufacturer of an automobile to

provide a means of safe transportation. The Defendants argue that a motorcycle being smaller, lighter in weight and less conspicuous cannot be made safe as a means of transportation on streets and highways where automobiles dominate. Defendants miss the boat with that argument. Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable. *Larsen v. General Motors Corporation*, 391 F.2d 495 at 502 (8th Cir. 1968). It is just as foreseeable that a motorcycle will be involved in an accident as it is foreseeable that an automobile will be involved in an accident. Foreseeability is a conceptual cornerstone of the crashworthiness doctrine. *Nicolodi, supra* at 71. For transportation purposes, a motorcycle is as much a motor vehicle as an automobile and the scope of reasonably foreseeable use is the same. *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973).

There is no principal basis to conclude that liability for failure to provide reasonable, cost acceptable safety features to reduce the severity of injuries suffered in inevitable accidents should be imposed upon automobile manufacturers but not upon motorcycle manufacturers. *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo.1987), *cert. dismissed Honda Motor Co. v. Camacho*, 485 U.S. 901, 99 L.Ed.2d 229, 108 S.Ct. 1067 (1988).

The Defendants' argument has centered mainly on the open and obvious defense. Defendants allege that the fact that the motorcycle purchased by Plaintiff was a lightweight open air vehicle which provided no means of protection to the rider's lower extremities in the event of an accident was so open and obvious to the Plaintiff that he is barred from recovery. Defendants' argument verges

on reliance on the assumption of the risk doctrine. While not identical, both doctrines would bar Plaintiff's recovery. It is difficult for this Court to harmonize the open and obvious defense, the assumption of the risk doctrine and comparative negligence under Mississippi law. The Mississippi Supreme Court has had a difficult time with these questions as well. That Court has ruled where assumption of the risk overlaps and coincides with contributory negligence, the rules of contributory negligence are applicable. *Braswell v. Economy Supply Company,* 281 So.2d 669 (Miss. 1973). The Court there stated that virtually the only time assumption of the risk applies is when the injured party's own negligence was the sole proximate cause of his injuries. The Mississippi Supreme Court has gone to the very brink of abolishing the assumption of the risk doctrine, but has not yet done so. *Cf. McDaniel v. Ritter,* 556 So.2d 303 (Miss. 1989) (dissenting opinion by Justice Sullivan). In any event, if assumption of the risk is still a viable doctrine under the law of Mississippi, it is to be measured by the subjective state of mind of the injured party. *Alexander v. Conveyors and Dumpers, Inc.,* 731 F.2d 1221 (5 Cir. 1984). The Plaintiff herein has testified that he was not aware of and did not appreciate the danger of injury to his lower extremities if the motorcycle which he was riding was involved in an accident. He stated that if he had known this danger he would not have purchased the motorcycle. Clearly assumption of the risk cannot apply in the face of Plaintiff's uncontroverted testimony.

The next question which is closely akin to assumption of the risk is whether the failure of the Defendants to put any type of leg protective devices on the motorcycle

or to make the motorcycle more conspicuous was so open and obvious to the Plaintiff as to bar his recovery. The open and obvious defense is still alive and well under Mississippi law even though this Court feels it should be subsumed by the comparative negligence doctrine. *Ward v. Hobart Mfg. Company,* 450 F.2d 1176 (5 Cir. 1971).[1] If the danger to the Plaintiff is open and obvious, there is no duty upon the manufacturer to warn of such danger nor can such danger be considered a defect in the product. *See also O'Donnell v. Casper,* 696 P.2d 1278 (Wyo. 1985).

However, whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious. *Corbin v. Coleco Industries, Inc.,* 748 F.2d 411 (7th Cir. 1984). The ultimate fact issue for the jury in this product liability action is the reasonableness of a product's design. The question of whether the Plaintiff had actual knowledge of the specific hazards comprising the danger should ordinarily be a fact question left for the jury and not precluded by the conclusion that the danger should have been obvious. Uncritical rejection of design defect claims in all cases wherein the danger may

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[1] According to Shepard's Citations (7th Edition 1989), the *Ward* decision was partially overruled in *Porter v. American Optical Corp.,* 641 F.2d 1128 (5th Cir. 1981). However, a reading of the relevant portions of the opinion leads the Court to conclude that *Ward* was only distinguished therein.

be open and obvious thus contravenes sound public policy by encouraging design strategies which perpetuate the manufacture of dangerous products. *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978); *accord, e.g. McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652 (8th Cir. 1982) (applying Missouri law); *Davis v. Fox River Tractor Co.*, 518 F.2d 481 (10th Cir. 1975) (applying Oklahoma law); *Beloit Corp. v. Harrell*, 339 So.2d 992 (Ala.1976); *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976); *Auburn Machine Works Co. v. Jones*, 366 So.2d 1167 (Fla. 1979); *Siruta v. Hesston Corp.*, 232 Kan. 654, 659 P.2d 799 (1983); *Holm v. Sponco Manufacturing, Inc.*, 324 N.W.2d 207 (Minn. 1982). This Court cannot agree that the purchaser of a motorcycle bargains for the risk of serious leg injury; rather, the purchaser bargains for a motorized vehicle the purpose of which is to provide an economical open air maneuverable form of transportation on the roadways. *Camacho, supra. Cf.* Wade, "On the Nature of Strict Liability for Products", 44 Miss.L.J. 825 (1973).

In light of the Plaintiff's deposition testimony and the testimony offered by the Plaintiff's experts, the Court is of the opinion that there are enough fact issues in question to warrant presenting to the jury the issue of open and obvious danger to the Plaintiff. If the danger was open and obvious to the Plaintiff or if he assumed any degree of risk in operating the motorcycle then the jury can certainly take this into consideration in apportioning a degree of fault to the Plaintiff and thereby reducing his damages. The common law is not sterile or rigid and serves the best interest of society by adapting standards of conduct and responsibility that fairly meet

the emerging and developing needs of our time. *Larsen v. General Motors Corporation*, 391 F.2d 495 at 506 (8th Cir. 1968). The question of whether a product is reasonably safe is a flexible one and to be determined by the facts of each case. *Toliver supra* at 217 citing *Dunson v. S.A. Allen, Inc.*, 355 So.2d 77 (Miss. 1978). It is question of fact whether the particular article involved was reasonably safe when it left the control of the manufacturer. *State Stove Mfg. Co. v. Hodges*, 189 So.2d 113 at 121 (Miss. 1966), *cert. den., Yates v. Hodges*, 386 U.S. 912, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967).

Under Plaintiff's strict liability theory, he must show that the motorcycle was defective and that its defective condition made the product unreasonably dangerous to him. *Toliver supra* at 218.

At this stage of the litigation, it would be improper for the Court to enter summary judgment for the Defendants. The Plaintiff is entitled to present his theories of liability to a jury as the Court is of the opinion that there exists material questions of fact in regard to each of the theories presented by the Plaintiff which can only be answered by the jury. Plaintiff is entitled to present to a jury the question whether the Honda Defendants failed to use reasonable care, or breached its implied warranty of merchantability, or manufactured an unreasonably dangerous product.

The Court will reserve a ruling on the issue of whether or not the punitive damages question should be submitted to the jury at the close of the evidence in this case.

IT IS, THEREFORE, ORDERED that the Defendants' motion for summary judgment is hereby overruled.

IT IS FURTHER ORDERED that a separate judgment will be entered herein in accordance with Federal Rules of Civil Procedure Rule 58.

SO ORDERED AND ADJUDGED this the 5th day of February, 1991.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES C. SATCHER — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0635(P)

HONDA MOTOR CO., LTD.,
AMERICAN HONDA MOTOR CO., INC.,
AND HONDA RESEARCH AND
DEVELOPMENT CO., LTD. — DEFENDANTS

JUDGMENT ON JURY VERDICT

[Filed Feb. 27, 1991]

This action came on for trial before the Court and a jury, Honorable Charles W. Pickering, Sr., District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, it is

ORDERED AND ADJUDGED:

1. That the Plaintiff, James C. Satcher, recover of and from the Defendants, Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda Research and Development Co., Ltd., the sum of ONE MILLION TWELVE THOUSAND AND NO/100 DOLLARS ($1,012,000.00) in actual damages, TWO MILLION AND NO/100 DOLLARS ($2,000,000.00) in punitive damages, for a total judgment of THREE MILLION TWELVE THOUSAND AND NO/100 DOLLARS ($3,012,000.00), less and except the sum of TWENTY SIX THOUSAND SIX HUNDRED AND FIFTY AND NO/100 DOLLARS ($26,650.00) which was received by the Plaintiff in a

pre-trial settlement with Fannie Fagan, for a net Judgment in favor of the Plaintiff in the amount of TWO MILLION NINE HUNDRED EIGHTY FIVE THOUSAND THREE HUNDRED FIFTY AND NO/100 DOLLARS ($2,985,350.00) with interest thereon at the rate of 6.21 per cent as provided by law, for which sum let execution issue.

2. That Plaintiff be granted leave to file a Motion to Tax Costs, which must be filed within fifteen (15) days of entry of this Judgment, and the issues to be determined after the matter is fully briefed.

DATED at Biloxi, Mississippi, this 27th day of February, 1991.

S/CHARLES W. PICKERING, SR.
U.S. DISTRICT JUDGE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JAMES C. SATCHER — PLAINTIFF

VERSUS — CIVIL ACTION NO. S87-0635(P)

HONDA MOTOR CO., LTD.
AMERICAN HONDA MOTOR CO., INC.
AND HONDA RESEARCH AND DEVELOPMENT
CO., LTD. — DEFENDANTS

ORDER ON DEFENDANTS' MOTION FOR NEW TRIAL

[Filed Sep. 24, 1991]

This matter is before the Court on Defendants' Motion for New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure, and the Court, having conducted a hearing thereon and having reviewed the briefs of the parties, the authorities cited and being fully advised in the premises, finds as follows, to-wit;

This matter was tried before a jury commencing February 11, 1991, and concluded with a verdict in favor of the Plaintiff in the amount of $1,012,000.00 actual damages and $2,000,000.00 punitive damages on February 22, 1991. The Court entered judgment on the verdict in the amount of $2,985,350.00 after allowing a credit to the Defendants in the amount of $26,650.00 for a pre-trial settlement received by the Plaintiff.

The Defendants, as the main basis of their motion for new trial, have requested the Court to revisit its decision denying the Defendants' summary judgment motion. Out of an abundance of fairness, the Court has done so and is still confident that its denial of that motion was just and proper. The Court was, and still is, of the opinion that there were genuine issues of material fact regarding the issues that Defendants raised in their motion that could only be submitted to the jury as the trier of the facts, thus precluding summary judgment. This Court will not reiterate its position on any of the issues decided in the opinion denying Defendants' motion for summary judgment, but will let that opinion stand. The Court will address each of the issues presented by the Defendants in support of their motion for new trial not discussed in the opinion denying summary judgment.

The Defendants' [sic] assert that the verdict was against the overwhelming weight of the credible evidence. Where there is a conflict in substantial evidence, a jury question is created. *See Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969). This Court is of the opinion that there was a conflict in substantial evidence. This trial lasted for eight trial days. There was voluminous testimony presented by both parties by way of lay witnesses, expert witnesses, video and transcribed depositions, video tests and feasibility studies and extensive use of demonstrative exhibits including the motorcycle itself involved in the crash. There was substantial evidence to support the jury's verdict on all issues.

The Defendants' [sic] try to pick apart the verdict on individual issues comprising the Plaintiff's overall claim. However, the Defendants' [sic] did not request a special

verdict nor did they request interrogatories be presented to the jury. The Defendants, in fact, agreed to the form of the general verdict returned. Defendants now request this Court to do what they assert the jury did; namely to speculate and conjecture as to the possibility of the jury's improper application of the law to the facts of this case. Suffice it to say that there was substantial evidence presented to support the jury's verdict on all issues.

As regards the Defendants' assertions that the jury was improperly instructed on the standard for judging whether the alleged defects to the motorcycle were "open and obvious", this Court would point out that there were no less than three instructions which set forth the "consumer expectations test" as being the proper objective standard for the jury to apply. *See* Instructions D-4, D-14 and P-13.

Defendants assert that they should have been granted a directed verdict or a peremptory instruction on Plaintiff's conspicuity claim because the "uncontroverted testimony" was that Fannie Fagan saw the Plaintiff's motorcycle prior to the crash. Fagan did not testify and the Court is not aware of any proffer of Fagan's testimony on this point. The Court did, however, review Fagan's deposition prior to rendering its decision on the summary judgment motion. That testimony was equivocal, at best. Fagan did state she saw the motorcycle – and thought it was a child playing in the road. She did not recognize it as a motorcycle until the crash was imminent. If anything, this testimony would have bolstered Plaintiff's conspicuity claim because the idea of conspicuity is to create a

conspicuousness so that people confronted with a motorcycle will recognize it as such immediately. There was, therefore, a conflict in substantial evidence which created a jury issue on the conspicuity claim. *Boeing Company v. Shipman, supra.* What role this claim played in the jury's verdict can only be arrived at by speculation and conjecture because the Defendants' [sic] did not request a special verdict nor did they request interrogatories be presented to the jury.

The Defendants next assert that the Court erred in refusing to instruct the jury on assumption of the risk. Where assumption of the risk overlaps and coincides with contributory negligence, the rules of contributory negligence are applicable. Virtually the only time assumption of the risk applies is when the injured party's own negligence was the sole proximate cause of his injuries. *Braswell v. Economy Supply Company,* 281 So.2d 669 (Miss. 1973). This Court is of the opinion that there was substantial evidence that the Plaintiff's injuries were caused by means other than his own negligence and that the jury was properly instructed on contributory negligence. *See* Instruction P-11.

The Defendants' next contention is that the Court erred in not instructing the jury that the Defendants were liable only for any enhancement injuries to the Plaintiff; i.e. any increase in injuries suffered as a result of any defect in the motorcycle which caused it to be unreasonably dangerous to the Plaintiff. Mississippi has not spoken to this issue, directly. However, it is well settled that a tort-feasor is liable only for the injuries proximately caused by him. The jury was, in fact, instructed that the

Plaintiff had to prove, by a preponderance of the evidence and with a reasonable medical certainty, that any damages claimed by him were proximately caused by the Defendants. Absent a stricter standard in Mississippi which would require the Plaintiff to prove with specificity his enhanced injuries, injury is a question of proximate cause. The jury was properly instructed on proximate cause.

As to Plaintiff's instructions to which Defendants' assert error, the Court would note that the Defendants did not object to a number of them at the time they were offered and thus have no basis to object to them now. Defendants specifically object to the punitive damages instruction. This instruction was actually offered by the Defendants and was adopted by the Plaintiffs as P-20. There was substantial evidence to support the jury verdict of punitive damages. The instruction on punitive damages is a correct statement of the standard for awarding such damages. *See South Central Bell v. Epps,* 509 So.2d.886 (Miss. 1987); *Fowler Butane [G]as Co. v. Varner,* 141 So.2d 226 (Miss. 1962); *Scott v. Transport Indemnity Co.,* 513 So.2d 889 (Miss. 1987); and *Planters Wholesale Grocery v. Kincade,* 50 So.2d 578 (Miss. 1951).

The Court is of the opinion that when all the instructions are read as a whole, the jury was properly instructed on all issues and Defendants' contentions to the contrary are without merit.

Defendants' [sic] next contend that the Court erred in overruling a prior order of Magistrate Singletary, *in limine,* regarding the production of defense expert witness

fees. Magistrate Singletary's order dealt with the production of canceled checks or other documents over a twenty year period indicating fees received by the witnesses for the Defendants. The Magistrate denied Plaintiff's motion to compel production of these documents on the basis that it would be oppressive and burdensome and due to the fact that the Plaintiff had received such information through other means of discovery. After receiving Plaintiff's *in limine* request for production of such fee information over a period of the previous five years, the Court reviewed the Magistrate's order and all discovery produced on the subject. The Court found that the Defendants' [sic] had failed to produce one iota of information regarding such fee information and further was of the opinion that this exact *in limine* issue was not previously addressed in Magistrate Singletary's order. Such information is necessary and admissible to infer bias of the witness, as recognized in Magistrate Singletary's order. Defendants' contention that this unduly prejudiced them is without merit.

Defendants' [sic] next contend that the Court admonished Defense Counsel Lewis in front of the jury about the improper use of a letter from Harley-Davidson to the City of Milwaukee police department. After a careful review of the record in this matter, the Court has come to the conclusion that Defendants' contentions are completely without merit. The record clearly shows that the discussion about the Harley-Davidson letter was at a bench conference out of the hearing of the jury. The Court did give a precautionary instruction to the jury about the contents of the letter without objection from either party. This instruction was given in conformity with an *in limine*

order secured by the Defendants regarding the results of other jury verdicts in motorcycle crash cases.

As regards Defendants' assertions that the Court improperly injected its own views into the trial when it objected to a video depicting a prior scientific crash, the Court would point out that it first excused the jury before questioning Defense Counsel as to the purpose of the film. The Court would further point out that Defense Counsel was at a considerable loss as to the reason for the admissibility of the video until suggested by the Court. In any event, the Court has an ongoing duty to see that trials are conducted in accordance with the rules of evidence and civil procedure. The Court will not shirk from this obligation to monitor and control the trial. It did and will continue to conduct trials in an orderly and proper manner while disrupting proceedings as little as possible. But if it is necessary to stop a trial to determine the admissibility of a questionable piece of evidence, even without objection, the Court is duty bound to do so. Defendants' other contentions as to the Court's control of the trial are without merit.

Defendants next contend that it was error for the Court to exclude evidence of the Plaintiff's propensity to speed on the road where he was injured. Defendants' [sic] offered such testimony pursuant to Rule 406, Fed.R.Evid., to show custom or habit. Based on the Court's review of the evidence offered by the one live witness offered by the Defendants and the very convoluted proffer of two other witnesses, the Court is of the opinion that it was properly excluded as not rising to the level necessary to be admissible under Rule 406 to establish a custom or habit of speeding.

As regards the Defendants' claim that the Court incorrectly excluded evidence of the Plaintiff's previous felony convictions by sustaining Plaintiff's *in limine* motion, the Court would call Defendants' attention to its *in limine* ruling of February 11, 1991, which ruling was signed by Counsel for Defendants. That ruling specifically provided that the " . . . Court will rule on this matter at the time of trial." Defendants did not offer any evidence of prior convictions and this argument is therefore precluded.

Defendants' other contentions as to the Court's evidentiary rulings are without merit.

At the hearing on this motion on May 20, 1991, the Defendants made certain allegations as to errors in the daily copy transcript. The Court would note that the Defendants failed to follow the proper procedure for informing the Court Reporter of these alleged errors and waited to state such allegations on the record at the time of the hearing. This put the Court Reporter at a distinct disadvantage in that she was unable to verify the daily copy transcript until after the hearing. The Court directed all Counsel to supplement their briefs with specific references to the daily copy transcript and to point out any of the alleged errors. None were forthcoming nor was the Court Reporter requested by counsel to verify any part of the transcript. Therefore the Court can only conclude that the transcript is complete and any insinuations to the contrary are without merit. All Counsel are urged to use the proper procedure to question records in the future.

The Court, having reviewed the Defendants' Motion for New Trial and finding it to be without merit, it is therefore OVERRULED, AND IT IS SO ORDERED.

SO ORDERED AND ADJUDGED this the 23 day of SEPTEMBER, 1991.

/s/ Charles W Pickering, Sr.
CHARLES W. PICKERING, SR.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

James C. SATCHER, Plaintiff-Appellee,

v.

HONDA MOTOR COMPANY, LTD., and Its Wholly Owned Subsidiaries, American Honda Motor Company, Inc., and Honda R & D Co., Ltd., Defendants-Appellants.

No. 91-7138.

United States Court of Appeals,
Fifth Circuit.

Jan. 25, 1993.

Linda J. Hamilton Mowles, Lewis, King, Krieg & Waldrop, Knoxville, TN, (MS) Tere R. Steel, Ronald G. Peresich, Page, Mannino & Peresich, Biloxi, MS, for defendant-appellants.

Ray Ferrero, Jr., Joanne Fanizza, Ferrero & Middlebrooks, Wilton L. Strickland, Ft. Lauderdale, FL, Peter K. Smith, Quitman, MS, Robert E. Arceneaux, Mack E. Barham, Lee A. Archer, Barham & Markle, New Orleans, LA, for Satcher.

Appeal from the United States District Court for the Southern District of Mississippi.

Before JOLLY and DUHÉ, Circuit Judges, and PARKER,* District Judge.

E. GRADY JOLLY, Circuit Judge:

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* Chief Judge of the Eastern District of Texas, sitting by designation.

James C. Satcher was riding a Honda motorcycle when he was struck by an automobile that traumatically amputated his leg. He sued Honda under theories of strict product liability and negligent product design, asserting that the motorcycle was defective and unreasonably dangerous because it lacked leg guards. He also alleged that the design was defective because the motorcycle was not readily conspicuous to oncoming motorists. Honda countered by moving for summary judgment on the basis that Mississippi's "open and obvious" doctrine barred recovery and that the motorcycle's "inconspicuity" was not causally related to Satcher's injuries. The district court denied Honda's motion for summary judgment and allowed Satcher's case to proceed to trial. 758 F.Supp. 393. The jury returned a verdict for Satcher in the amount of $3,017,000. Honda Motor Co., Ltd., American Honda Motor Co., Inc., and Honda R & D Co., Ltd. (collectively "Honda") appeal. We hold that under the applicable Mississippi law, the consumer expectations test applies in product liability cases, and because the alleged defect as well as the danger was open and obvious to the ordinary consumer, the motorcycle was not "unreasonably dangerous." Similarly, because the danger was open and obvious to a casual observer, Satcher is barred from recovery in his negligence claim. Furthermore, the motorcycle's alleged "inconspicuity" could not have caused Satcher's injuries, and, because there is no causal relationship, the "inconspicuity" claim fails. For the reasons set out below, we REVERSE the district court's judgment and RENDER judgment in favor of all defendants.

I

Before addressing the merits of this appeal, we must deal with the procedural issues it presents. Satcher argues that because Honda did not move for a directed verdict either after Satcher presented his case or at the close of its case, and because it moved for a new trial and did not ask for JNOV, the district court's denial of summary judgment is moot and thus beyond review. Furthermore, Satcher argues that because the jury returned a verdict for Satcher after it was properly instructed on the "open and obvious" defense, we are precluded from finding that no reasonable jury could have found that the defect and danger presented by this motorcycle's lack of leg protection were not open and obvious. Similarly, Satcher argues that the jury's verdict supports his "conspicuity" claim and it cannot now be revisited.

Honda's motion for a new trial was understood by the trial judge to include a motion for JNOV, including the argument that the defendants were entitled to summary judgment. At the hearing on the defendants' motion for new trial, the trial judge specifically commented on this aspect of Honda's motion[1] and repeated and readopted his denial of Honda's motion for summary judgment.

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[1] "Now, at the top of Page 3, Item 4 [of Defendants' Motion for New Trial], you again bring up open and obvious defense, and you say to a casual observer or to any ordinary consumer, *which again is bringing back the issue of the Court's ruling on the motion for summary judgment.*" (Emphasis ours.) Transcript of 5/20/91 hearing on defendants' motion for new trial, p. 57.

It is well established that notices of appeal, with some few specific exceptions, are to be read liberally. *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962), *McLemore v. Landry*, 898 F.2d 996, 999 (5th Cir.1990). Consequently, we must read Honda's notice of appeal as placing before us each of the trial court's adverse rulings against Honda, including its denial of summary judgment to Honda. *See Moore's Federal Practice* § 203.17[2] (appeal from final judgment draws into question and allows attack on all prior non-final orders and all rulings that produced judgment); *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir.1961).

In reviewing the trial court's ruling on summary judgment, this court applies the same standard as the trial court, viewing the facts in the light most favorable to the nonmoving party. *Federal Deposit Ins. Corp. v. Hamilton*, 939 F.2d 1225, 1228 (5th Cir.1991). We decide questions of law *de novo*. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988). Summary judgment is proper if the pleadings, depositions, admissions, and other summary judgment evidence demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1255 (5th Cir.1990).

II

In reversing and rendering, it appears necessary for us to point out that district courts are, in diversity cases, bound by the decisions of the forum state. *Erie R.R. Co. v.*

Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Grenada Steel Industries, Inc. v. Alabama Oxygen Co.*, 695 F.2d 883, 885 (5th Cir.1983). Furthermore, under the doctrine of *stare decisis*, the district court is bound by the prior decisions of this court in interpreting Mississippi law. The trial judge failed to recognize these principles in denying summary judgment to Honda. For example, although the district court stated that *"[t]he open and obvious defense is still alive and well under Mississippi law* even though this Court feels it should be subsumed by the comparative negligence doctrine," (emphasis ours), *Satcher v. Honda Motor Co.*, 758 F.Supp. 393, 396 (S.D.Miss.1991), it proceeded to apply the open and obvious defense based on holdings from the Seventh Circuit and other foreign jurisdictions, using a subjective standard. This burst of inspired creativity directly contravened our holding in *Melton v. Deere & Co.*, 887 F.2d 1241, 1243-44 (5th Cir.1989), and the Mississippi law upon which *Melton* is based. Notwithstanding the judge's belief that there are good policy reasons for his approach, he was not free to apply his *ex cathedra* approach.

For the reasons set out in *Toney v. Kawasaki Heavy Industries*, 975 F.2d 162 (5th Cir.1992), we reverse the district court's judgment entered upon the jury verdict in this case. As a matter of law, Satcher stated no claim against Honda. Under the applicable Mississippi law, the consumer expectations test applies in product liability cases, and because the alleged defect and danger were open and obvious to the ordinary consumer, the motorcycle was not "unreasonably dangerous." Similarly, because the danger was open and obvious to a casual observer, Satcher is barred from recovery in his negligence claim.

Furthermore, the motorcycle's alleged "inconspicuity" could not have caused Satcher's injuries, and, because there is no causal relationship, the "inconspicuity" claim fails.[2] The district court erred in failing to grant Honda's motion for summary judgment. This case should never have gone to trial. The judgment of the district court is REVERSED and judgment for defendants is herewith RENDERED.

REVERSED and RENDERED.

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[2] Satcher additionally sued Honda on the theory that the motorcycle was unreasonably dangerous because Honda failed to manufacture it in such a way that it was adequately conspicuous to other vehicles. Even assuming the merit of this argument, the evidence shows that Mrs. Fagan, the driver of the automobile that collided with Satcher, first saw the motorcycle from a distance and thought it was a child playing in the road. *Satcher*, 758 F.Supp. at 393-94. It is therefore clear that Fagan recognized the motorcycle as an object that she should approach with care and attempt to evade. At the time of impact, Mrs. Fagan's automobile was "either stopped or barely moving." *Satcher*, 758 F.Supp. at 394. Yet she still turned her car into the plaintiff's lane of traffic; indeed, she turned her car directly in front of the plaintiff's motorcycle. The plaintiff's motorcycle could not have been any more conspicuous at this point. There is simply no causal connection between the motorcycle's "inconspicuity" and Mrs. Fagan's collision with it. As a matter of law, causation is lacking and this claim fails.

APPENDIX F

James C. SATCHER, Plaintiff-Appellee,

v.

HONDA MOTOR COMPANY, LTD., And Its Wholly Owned Subsidiaries, American Honda Motor Company, Inc., and Honda R & D Co., Ltd., Defendants-Appellants.

No. 91-7138.
United States Court of Appeals,
Fifth Circuit.

May 28, 1993.

Linda J. Hamilton Mowles, Lewis, King, Krieg & Waldrop, Knoxville, TN, Tere R. Steel, Ronald G. Peresich, Page, Mannino & Peresich, Biloxi, MS, for defendants-appellants.

Ray Ferrero, Jr., Joanne Fanizza, Ferreroo & Middlebrooks, Ft. Lauderdale, FL, for Satcher.

Wilton L. Strickland, Ft. Lauderdale, FL, Peter K. Smith, Quitman, MS, Robert E. Arceneaux, Mack E. Barham, Lee A. Archer, Barham & Markle, New Orleans, LA, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(Opinion January 25, 5th Cir., 1993
984 F.2d 135)
Before JOLLY and DUHÉ, Circuit Judges,
and PARKER*, District Judge.

ON PETITION FOR REHEARING &
SUGGESTION FOR REHEARING EN BANC

E. GRADY JOLLY, Circuit Judge:

The original opinion in this matter was issued by the panel on January 25, 1993. A petition for panel rehearing and a petition for rehearing *en banc* are currently pending before the court. The petition for *en banc* rehearing is DENIED, no judge in active service having requested that the court be polled. The petition for panel rehearing is GRANTED. In view of recent developments in the law governing products liability in Mississippi, we now VACATE our original opinion and REMAND the case to the district court for further consideration in the light of these developments.

On March 5, 1993, the Mississippi state legislature enacted House Bill 1270, codifying various elements of Mississippi common law regarding products liability. On March 25, 1993, the Mississippi Supreme Court issued its opinion in *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss.1993) holding that, contrary to prior Fifth Circuit opinions and this panel's opinion in the instant case, Mississippi applies a "risk-utility" analysis in products liability cases and has done so since 1987. These events, occurring subsequent to the panel opinion in this case but

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* Chief Judge of the Eastern District of Texas, sitting by designation.

while petitions for rehearing were pending before the court, have the potential to alter drastically Mississippi's products liability law.

The appellants argue, in response to the petition for rehearing, that *Sperry-New Holland* should not be applied to this case because doing so would result in manifest injustice to the parties, that the risk-utility standard does not preclude summary judgment in this case, and that House Bill 1270 codifies Mississippi law as it existed pre-*Sperry-New Holland* and changes procedures relative to punitive damage awards. The district court, with its extensive knowledge of the facts and proceedings in this case, is in a far better position than are we to address and to first apply these new arguments, and to apply the newly developed law to the facts of this case. Thus, we vacate our original opinion and remand this case to the district court for further consideration.

Petition for panel rehearing GRANTED; opinion VACATED; and case REMANDED.

APPENDIX G

James C. SATCHER, Plaintiff,

v.

HONDA MOTOR CO., LTD., American Honda Motor Company, Inc., and Honda Research and Development Company, Ltd., Defendants.

No. 1:87-CV-635 PR.

United States District Court, S.D. Mississippi,

Southern Division.

June 21, 1994.

Peter K. Smith, Quitman, MS, Ray Ferrero, Jr., Ferrero & Middlebrooks, Wilton L. Strickland, Ft. Lauderdale, FL, Mack E. Barham, Robert E. Arceneaux, Barham & Arceneaux, New Orleans, LA, for plaintiff.

Ronald G. Peresich, Tere R. Steel, Page, Mannino & Peresich, Charles B. Lewis, Paul D. Hogan, Jr., Linda Hamilton Mowles, Morton, Lewis, King & Krieg, Knoxville, TN, for defendants.

MEMORANDUM OPINION AND ORDER ON REMAND

PICKERING, District Judge.

This matter is before this Court on remand from the Fifth Circuit.

PROCEDURAL HISTORY

This product liability case involving a motorcycle-car collision that occurred on October 15, 1985, was filed on

October 8, 1987. On October 5, 1990, the defendants moved for summary judgment. This case was assigned to this Court on October 18, 1990, and the motion for summary judgment was denied by this Court[1] on February 5, 1991. On February 27, 1991, following a jury verdict, judgment was entered for plaintiff both as to compensatory and punitive damages. A timely motion for new trial was filed by defendants. Defendants filed neither a motion for directed verdict on the defense of open and obvious nor a motion for judgment notwithstanding the verdict on any ground. On September 23, 1991, this Court

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[1] 758 F.Supp. 393 (S.D.Miss.1991). In denying Defendants' Motion for Summary Judgment this Court concluded that there were genuine issues of material fact that should be submitted to a jury for resolution, including the defense of "open and obvious." Prior to this Court's opinion, there were at least two Fifth Circuit opinions that had held that the defense of "open and obvious" was properly submitted to the jury. *See, Garner v. Santoro,* 865 F.2d 629 (5th Cir.1989) (remanded on other grounds) (failure to warn); and *Page v. Barko Hydraulics,* 673 F.2d 134 (5th Cir.1982) (remanded on other grounds) (defective design). Additionally, another Fifth Circuit case handed down since the trial of this matter held the defense of "open and obvious" was properly submitted to the jury. *See, Batts v. Tow-Motor Forklift Co.,* 978 F.2d 1386 (5th Cir.1992). There were also Fifth Circuit decisions holding that the defense of "open and obvious" was a legal question and summary judgment or directed verdict in favor of the defendant was appropriately entered by the trial court. In its opinion denying summary judgment, and in holding that the defense of "open and obvious" should be submitted to the jury, this Court erroneously discussed the "open and obvious" defense from a "subjective" standpoint rather than an "objective" standpoint. However, when this case was submitted to the jury the open and obvious defense was defined under an "objective," not a "subjective" standard.

rendered a decision denying defendants' motion for a new trial. Timely appeal was made to the Fifth Circuit. On January 25, 1993, a panel of the Fifth Circuit entered an opinion reversing and rendering judgment for defendants.[2] Plaintiff filed a petition for rehearing. On May 28, 1993, the Fifth Circuit granted the rehearing and vacated its January 25, 1993, opinion and remanded the case to this Court.

After remand, defendants filed a pleading styled Second Supplemental Motion for New Trial and Motion for Judgment Notwithstanding the Verdict.[3] Plaintiff has moved to strike the Motion for Judgment Notwithstanding the Verdict as untimely.[4] Plaintiff has filed a pleading styled "Motion to Reaffirm Judgment After Reconsideration on Remand."

Defendants assert that they are entitled to judgment as a matter of law based on state law precedent that was in effect at the time this case was tried in 1991, and that

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[2] 984 F.2d 135 (5th Cir.1993). The Fifth Circuit in its original Opinion noted that this Court had erroneously applied a "subjective standard" to the defense of "open and obvious" and held that the question of "open and obvious" should have been ruled on as a matter of law and that Defendants' Motion for Summary Judgment should have been sustained.

[3] This is now a motion for judgment as a matter of law under Amended Rule 50, Federal Rules of Civil Procedure.

[4] Defendants did not at any time make a Motion for Directed Verdict as to the defense of "open and obvious," as indicated above, and did not make a Motion for Judgment Notwithstanding the Verdict on any ground at any time before this matter was remanded to this Court.

Prestage[5] established a new standard of liability and care and that to apply it retroactively would result in manifest injustice to the defendants. Defendants further contend that if the Court applies *Prestage*, then they are entitled to a new trial because of the application of the "consumer expectations test" rather than the "risk-utility analysis" and further that the punitive damages section of House Bill 1270[6] (§ 11-1-65 of Miss.Code of 1972), effective July 1, 1993, affects the procedure for determining punitive damages and thus affects plaintiff's entitlement to punitive damages in this action.

Plaintiff responds that §§ 11-1-63, 11-1-65, as enacted in House Bill 1270, have no application to this case and that *Prestage* merely clarified existing law in Mississippi and is in harmony with this Court's earlier ruling that the "open and obvious" defense is a question for the jury and not a complete bar to his recovery.

In the opinion of the Fifth Circuit granting the petition for rehearing and remanding this case, the Court stated:

> In view of recent developments in the law governing products liability in Mississippi, we now VACATE our original opinion and REMAND the

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[5] *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss.1993), decided by the Mississippi Supreme Court on March 25, 1993, precipitated the Fifth Circuit's remand of the instant action.

[6] This is now codified at Miss.Code Ann. § 11-1-63 (products liability section) and § 11-1-65 (punitive damages section). The bill was adopted by the Mississippi House of Representatives on February 8, 1993, the Mississippi Senate on February 17, 1993, and approved by the Governor of Mississippi on February 18, 1993.

case to the district court for further consideration in the light of these developments.

On March 5, 1993, the Mississippi state legislature enacted House Bill 1270, codifying various elements of Mississippi common law regarding products liability. On March 25, 1993, the Mississippi Supreme Court issued its opinion in *Sperry-New Holland v. Prestage*, 617 So.2d 248, holding that, contrary to prior Fifth Circuit opinions and this panel's opinion in the instant case, Mississippi applies a "risk-utility" analysis in products liability cases and has done so since 1987.[7] These events, occurring subsequent to the panel opinion in this case but while petitions for rehearing were pending before the court, have the potential to alter drastically Mississippi's products liability law.

The appellants argue in response to the petition for rehearing that *Sperry-New Holland* should not be applied to this case because doing so would result in manifest injustice to the parties, that the risk-utility standard does not preclude summary judgment in this case, and that House Bill 1270 codifies Mississippi law as it existed pre *Sperry-New Holland* and changes procedures relative to punitive damage awards. The district court, with its extensive knowledge of the facts and proceedings in this case, is in a far better position than are we to address and to first apply these new arguments, and to apply

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[7] The Mississippi Supreme Court relied on *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss.1988), and *Hall v. Miss. Chemical Exp., Inc.*, 528 So.2d 796 (Miss.1988), to support the holding of *Prestage*. In *Prestage*, *Hall* is cited as a 1987 decision, 617 So.2d at 253. However, both decisions were handed down in 1988.

> the newly developed law to the facts of this case. Thus, we vacate our original opinion and remand this case to the district court for further consideration.

As this Court understands the remand, and the motions filed by the parties since remand, this Court is to decide the following questions: (1) Does House Bill 1270 merely codify Mississippi law as it existed prior to *Prestage*? (2) What is the effect of House Bill 1270 on this case? (3) What is the effect of *Sperry-New Holland v. Prestage*, 617 So.2d 248, on this case? (4) If *Prestage* is applicable: (a) will its application result in manifest injustice to defendants; and (b) does the risk-utility standard preclude summary judgment in this case? (5) Should defendants' Motion for Judgment Notwithstanding the Verdict be stricken as untimely filed? (6) Are defendants entitled to a new trial?

1. DOES HOUSE BILL 1270 MERELY CODIFY MISSISSIPPI LAW AS IT EXISTED PRIOR TO *PRESTAGE*?

House Bill 1270 provides that a plaintiff cannot recover in a products liability suit for (1) a construction or manufacturing defect, (2) inadequate warnings, (3) a design defect, or (4) breach of expressed warranty if the plaintiff has deliberately and voluntarily chosen to expose himself to a danger *known and appreciated.* Thus the Bill spells out that what has previously been regarded as an "assumption of the risk" defense will be a bar in those four specified types of products liability cases. This defense will be predicated upon the subjective knowledge of a plaintiff. The Bill also provides that as to product liability cases involving inadequate warnings the

defense of "open and obvious" will be a bar.[8] The standard for determining whether the product is unreasonably dangerous will be an "objective" one, not a "subjective" one. Thus, in inadequate warning cases "assumption of the risk" and "open and obvious" have been codified as bars to recovery under this Bill after July 1, 1994. In other products liability cases, "assumption of the risk," but not "open and obvious" will be a bar.

This Bill changes the burden of proof as well as the procedure for consideration of punitive damages. After July 1, 1994, punitive damages can be awarded only upon proof of "clear and convincing evidence." In cases filed after July 1, 1993, and in cases pending on July 1, 1993, in which judgment had not been entered, the procedure for awarding punitive damages is changed to the extent that a bifurcated trial is required. See MISS.CODE ANN. § 11-1-65 (Supp.1993).

The legislature adopted House Bill 1270 a little over a month before *Prestage* was decided. Since the *Prestage* decision had not been decided when the legislature adopted House Bill 1270, that decision could not have influenced the passage of House Bill 1270. Judicial decisions generally operate retrospectively since they are regarded as expressions of pre-existing law while statutory enactments operate only prospectively absent a clear

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[8] The Bill codifies the "consumer expectations test" as espoused in Comment i, Restatement of Torts (Second) in products liability cases involving inadequate warnings, but does not codify the "consumer expectations test" in other products liability cases. See § 11-1-63(e).

intent by the drafters requiring their retroactive application. *See, Kaiser Aluminum v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990); and *U.S. v. Security Industrial Bank,* 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982). Thus, under general legal principles, *Prestage* would operate retrospectively and House Bill 1270 would operate prospectively.

If House Bill 1270 was merely a codification of existing law immediately pre-*Prestage* (Again, the Bill was adopted a little over a month before *Prestage* was decided.), the legislature would have had no reason to delay the effect of the substantive portions of the bill relating to products liability until July 1, 1994, more than a year after its adoption. House Bill 1270 does not merely codify Mississippi products law as it existed prior to *Prestage.* It substantially changed that law. Under *Prestage,* "risk utility" would be the appropriate analysis and "assumption of the risk" would not be a complete bar. 617 So.2d at 256, 254. Under House Bill 1270 the "assumption of the risk" defense appears to replace the "risk utility analysis" of *Prestage* except in inadequate warnings cases where both "assumption of the risk" and "open and obvious" will apparently replace "risk utility." One cannot say with certainty what the law on this question was in Mississippi prior to 1988. However, the Mississippi Supreme Court in *Prestage* has determined what the law was from 1988 to July 1, 1994. "Risk utility" was the correct analysis during that period.

Whether House Bill 1270 changed the law, or merely codified pre-*Prestage* law is immaterial for two reasons. First, *Prestage* determines what the law on products liability was in Mississippi prior to the adoption of House

Bill 1270. *Prestage* determines Mississippi law on products liability from at least 1988 to July 1, 1994, and House Bill 1270 determines Mississippi law on products liability after July 1, 1994. This case was tried in 1991. Thus, this case is controlled by *Prestage*. Secondly, House Bill 1270 would not help defendants even if applicable, which it is not. The "open and obvious" defense of House Bill 1270 applies only to "inadequate warnings cases." This case was tried under a design defect theory. Therefore, even under House Bill 1270 the "open and obvious" defense would not be a bar to design defect.

For the reasons stated above it is immaterial whether House Bill 1270 codified Mississippi Products Liability law pre-*Prestage*.

2. DOES HOUSE BILL 1270 HAVE ANY EFFECT ON THIS CASE?

The enacting paragraph of House Bill 1270 provides:

> SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act, including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act, and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994.

The entire products liability section, § 11-1-63, and the substantive portions of the punitive damages section, § 11-1-65, do not go into effect until July 1, 1994. The procedural provisions of § 11-1-65, subsections (1)(a), (b), (c) and (d), apply only to "pending actions in which

judgment has not been entered on the effective date of the act, and all actions filed on or after the effective date of the act," which was July 1, 1993.

Final Judgment on the jury verdict was entered in this matter on February 27, 1991, and defendants' Motion for New Trial was denied September 23, 1991. Therefore, since the procedural provisions of § 11-1-65, subsections (1)(a), (b), (c) and (d), apply only to "pending actions in which judgment has not been entered on the effective date of the act", this case was not a "pending" action in which judgment had not been entered for purposes of application of the procedural portions of Section 2 of House Bill 1270.[9] The remaining portions of the bill are not effective until July 1, 1994, and have no effect on this action. Defendants' arguments to the contrary are without merit, House Bill 1270 has no application to this case.[10]

3. IS *PRESTAGE* APPLICABLE TO THE FACTS IN THIS CASE?

"Federal courts . . . in this Circuit are obliged to apply the latest and most authoritative expression of state

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[9] Miss.Code Ann. § 11-1-65, §§ (1)(a), (b), (c) & (d) (Supp.1993).

[10] There is no situation in which the substantive aspects of House Bill 1270 could impact on this case either in regard to punitive damages or products liability law. However, if for any reason the judgment should be set aside, and a new trial granted, in the opinion of this Court, the procedural aspects of House Bill 1270 as to punitive damages (that is the bifurcated trial) would then be applicable.

law applicable to the facts of a case." *LeMarque v. Massachusetts Indm. & Life Ins. Co.*, 794 F.2d 194, 196 (5th Cir.1986) "If substantive state law changes between the time of a federal trial and appeal, federal appellate courts must apply the state law as of the time of the appeal to give effect to the intervening state court decision." *Sioux Ltd. Sec. Litigation v. Coopers and Lybrand*, 914 F.2d 61, 63 (5th Cir.1990). Consequently, under the *Erie* doctrine,[11] the holding of the Mississippi Supreme Court in *Prestage* is binding upon federal courts. Since this case involves the same issue addressed in *Prestage*, *Prestage* is applicable to this case.

4A. DOES THE APPLICATION OF *PRESTAGE* RESULT IN MANIFEST INJUSTICE TO DEFENDANTS?

Defendants argue that *Prestage* established new law and that to apply such new law retrospectively would result in manifest injustice to Defendant. The fallacy of defendants' argument is that *Prestage* did not establish new law. The Fifth Circuit in its opinion remanding this case to this Court stated that *Prestage* held that "contrary to prior Fifth Circuit opinions and this panel's opinion in the instant case, Mississippi applies a 'risk-utility analysis' in products liability cases, and has done so since 1987."[12] *Satcher v. Honda Motor Co., Ltd.*, 993 F.2d 56, 57.

In *Prestage*, the Mississippi Supreme Court held "we today apply a 'risk-utility' analysis as adopted in *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss.1988), and *Hall v.*

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[11] *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[12] See footnote 7.

Miss. Chemical Exp., Inc., 528 So.2d 796 (Miss.1987)." *Sperry-New Holland v. Prestage*, 617 So.2d at 253 (emphasis added). Thus, based upon the explicit words found in the *Prestage* opinion itself, and the Fifth Circuit analysis of that opinion in remanding this case, *Prestage* did not announce new law, but articulated and explained law that had been in effect in Mississippi since 1988.[13] Defendants' argument that *Prestage* established new law is contrary to the facts.

The argument that *Prestage* announces new law and that to apply it to the facts of this case would create a miscarriage of justice for defendants is totally misplaced and has no application to the facts of this case. *See LeMarque, supra,* and *Coopers and Lybrand, supra.*

4B. DOES A RISK-UTILITY ANALYSIS PRECLUDE SUMMARY JUDGMENT IN THIS CASE?

Prior to trial, and during and after trial, defendants' major argument was that summary judgement should be granted because the doctrine of crash worthiness should

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[13] The clarification by the Mississippi Supreme Court that the "risk-utility analysis" had replaced the "consumer expectations test" with these two decisions has been referred to as "the best kept secret in Mississippi jurisprudence." *Batts v. Tow-Motor Forklift Company*, 153 F.R.D. 103 (N.D.Miss., Feb. 8, 1994). Judge Davidson, in granting Rule 60(b)(6) relief to the Plaintiff in *Batts* after the decision in *Prestage*, discussed candidly the incongruity of relying on *Hall* and *Whittley* for the holding of *Prestage*, while recognizing that certainly *Prestage* is the law in Mississippi regardless of its parentage and is thus binding on federal courts applying Mississippi law.

not be extended to motorcycles. While on appeal, defendants changed the emphasis of their argument and contended that summary judgment should have been granted because the dangerous condition was "open and obvious." In *Prestage* the Mississippi Supreme Court held that the defense of "open and obvious" was not a bar in products liability cases and thus a motion for summary judgment should not have been granted on the basis of the defense of "open and obvious."

In *Prestage*, "The trial court denied Sperry's Motion for Summary Judgment; denied its Motion for Directed Verdict; denied its request for preemptory instructions; and denied its Motion for Judgment Notwithstanding the Verdict [J.N.O.V.]." 617 So.2d at 251. The Mississippi Supreme Court affirmed, holding "Sperry's Motion for Summary Judgment, directed verdict, JNOV, and its request for preemptory instruction were all properly denied." 617 So.2d at 256.

Under the "risk-utility analysis," open and obvious is not a complete bar to potential recovery, it is simply a factor to consider in determining whether a product is unreasonably dangerous.[14] *Sperry-New Holland v. Prestage*, 617 So.2d at 256, n. 4. As the majority in *Prestage* stated, "Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from

---

[14] The view expressed in *Prestage* that open and obvious is not a complete bar is in unison with this Court's previous opinion wherein the Court expressed the belief that the open and obvious bar was diametrically opposed to Mississippi's adoption of the "pure" form of comparative negligence. *See* Miss.Code Ann. § 11-7-15 (1972).

that danger provided that the utility of the product is outweighed by the danger that the product creates. Under the 'risk-utility' test, either the judge or the jury can balance the utility and the danger-in-fact, or risk, of the product." 617 So.2d at 254. (citations omitted).

The original Fifth Circuit panel decision in this case determined that summary judgment should have been granted on the basis of the "open and obvious" defense based on an "objective" not a "subjective" finding. That decision was vacated because of *Prestage* and House Bill 1270. *Prestage* recognized that the defense of "open and obvious" was not a total bar in products liability cases. Under *Prestage* this case should have gone to the jury. Accordingly, under *Prestage*, summary judgment is not appropriate.

5. SHOULD DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BE STRICKEN AS UNTIMELY FILED?

Defendants filed no motion for a directed verdict and no motion for a preemptory instruction based on the defense of "open and obvious." Additionally, defendants filed no motion for judgment notwithstanding the verdict on any ground, until after remand. However, after the jury verdict, defendants did file a Motion for a New Trial. In the body of defendants' original Motion for a New Trial there was the following paragraph:

> "4. The defects attributed to the motorcycle were conditions which were open and obvious to a casual observer, or to any ordinary consumer, and therefore, Defendants were, as a matter of law, entitled to a verdict in their favor on each of Plaintiff's causes of action."

The introductory paragraph of defendants' original Motion for a New Trial provided only that "Defendants . . . move for a new trial. . . . " The Motion contained no prayer for relief and requested no relief other than the request for a new trial as set out in the introductory paragraph. Defendants did raise the defense of "open and obvious" as a ground for a new trial; however, the record is clear that the defendants did not request a judgment notwithstanding the verdict in their Motion for New Trial, or at any other time, until after remand of this case.

This Court in ruling on defendants' Motion for New Trial recognized that defendants were advancing the same argument as they had advanced for summary judgment, in regard to "open and obvious." However, this Court did not understand or interpret that to be a request for a judgment notwithstanding the verdict and defendants never so stated that to the Court nor was it addressed by the Court.

The "open and obvious" defense was discussed very little at the hearing on the motion for a new trial. Indeed, even in regard to defendants' motion for summary judgment, the thrust of defendants' argument was not the defense of "open and obvious" but the question of whether the crash worthiness doctrine should be extended to motorcycles as well as automobiles. The "open and obvious" defense was only an incidental issue to defendants until the decision in *Toney v. Kawasaki Heavy Industries, Ltd.*, 763 F.Supp. 1356 (S.D.Miss.1991).

In *Wells v. Hico Indep. School Dist.*, 736 F.2d 243 (5th Cir.1984), *cert. denied*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985), the Fifth Circuit held:

> Appellants also argue inter alia that the district court erred in failing to grant their motion for summary judgment on both due process issues and asks us to reverse the decision below on this basis. We decline to do so. . . . Once trial began, the summary judgment motions effectively became moot. . . . As this Court has held: The saving of time and expense is the purpose to be attained by a motion for summary judgment in the proper case. When in due course the final trial is had on the merits it becomes the best test of the rights of the movant. If he wins on trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment. *Woods v. Robb*, 171 F.2d 539, 541 (5th Cir.1948).
>
> We find no reason here to depart from this common sense approach.

736 F.2d at 251, fn. 9.

"[W]e normally do not review the denial of a motion for summary judgment which is followed by a full trial on the merits, the judgment being based on the latter." *Zimzores v. Veterans Administration*, 778 F.2d 264, 267 (5th Cir.1985)

> . . . denial of summary judgment will not serve as a ground of appeal after the movant loses a full trial on the merits. This is so because it would be unjust for the court of appeal to deprive a party of a judgment rendered after a full trial based upon the appellate court's examination of the evidence presented at the time of the motion.

6 Moore's Federal Practice § 56.22 at 64 (Supp.1992-93).

> It would be a constitutionally impermissible re-examination of the jury's verdict for the district court (or this court) to enter judgment N.O.V. on a ground not raised in the motion for directed verdict.

McCann v. Texas City Refining Co., Inc., 984 F.2d 667, 672 (5th Cir.1983). (Emphasis added.) (Other citations omitted) Since it is "constitutionally impermissible" for this Court to grant a "Judgment N.O.V. on a ground not raised in a motion for directed verdict" and since defendants filed no motion for a directed verdict on the "open and obvious" defense, this Court is prohibited from granting a judgment notwithstanding the verdict.

Defendants style the motion it filed before this Court after remand as Second Supplemental Motion for New Trial and Motion for Judgment Notwithstanding the Verdict. Although defendants had filed two motions asking for a new trial, defendants filed no motion requesting judgment notwithstanding the verdict. In the Motion for a New Trial the defense of "open and obvious" was mentioned only as outlined above. One cannot file a second or supplemental motion as to a motion that was never filed.

Based on the foregoing, this Court finds that plaintiff's motion to strike defendants' pleading styled Second Supplemental Motion for Judgment Notwithstanding the Verdict is meritorious and should be granted. However, regardless of the procedural problems, defendants are not entitled to a judgment notwithstanding the verdict under the holding of *Prestage* as more fully discussed under other headings.

6. ARE DEFENDANTS ENTITLED TO A NEW TRIAL?

Defendants contend, in the alternative, that they are entitled to a new trial. Motions for a new trial are ordinarily vested in the sound discretion of the Court. The Fifth Circuit test for granting motions for a new trial is whether the verdict is against the "great weight" of the evidence. *See Shows v. Jamisson Bedding, Inc.*, 671 F.2d 927 (5th Cir.1982) A trial court should grant a motion for a new trial if convinced that failure to do so would result in a miscarriage of justice. 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2806 at 49 (1973) The Fifth Circuit exercises a "broader review" of orders granting motions for a new trial on the basis of the verdict being against the great weight of the evidence than orders denying motions for a new trial, and in cases where a new trial has been granted exercises "particularly close scrutiny, to protect the litigant's right to a jury trial." *Shows*, 671 F.2d at 930. (citation omitted.)

However, defendants do not argue in this case that the verdict was against the great weight of the evidence. Defendants argue that they should be granted a new trial because the case was submitted to the jury under a "consumer expectations" analysis rather than a "risk utility" analysis. The problem with defendants' position is that they requested no instructions to present the case to the jury under the "risk-utility" analysis. The instructions on the "consumer expectations" test were submitted and argued for by the defendants and given by the Court.

Even though neither side cites specific authority, this Court concludes that it should analyze the motion for a

new trial on the basis of whether failure to grant the motion would result in "manifest injustice" to defendants. This test has been used to determine if a motion for a new trial should be granted on the basis that the verdict is against the great weight of the evidence, and it is used by appellate courts when determining whether or not to consider grounds raised for the first time on direct appeal. *See Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); and *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir.1976).

The appropriate place to begin that analysis is a consideration of the difference between an analysis under the "consumer expectations" test and an analysis under the "risk-utility" test as enunciated by the Mississippi Supreme Court. That analysis should start with the court's holding in *Prestage*.

The Court in that case reasoned:

> The doctrine of strict liability for a manufacturer, without negligence, was first applied in Mississippi in *State Stove Manufacturing Co. v. Hodges*, 189 So.2d 113, 119 (Miss.1966). *State Stove* has been consistently followed in Mississippi for many years.
>
> In *State Stove*, this Court accepted strict liability and defined its purpose as follows:
>
> The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

Id. at 120 (citation omitted) *State Stove* adopted the version of strict liability stated in Section 402A of the American Law Institute's Restatement of Torts (Second). It states:

> § 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. Restatement (Second) of Torts § 402A. (Emphasis added). . . .

617 So.2d at 253.

> Section 402A is still the law in Mississippi. How this Court defines the phrases "defective condition" and "unreasonably dangerous" used in 402A dictates whether a "consumer expectations" analysis or a "risk-utility" analysis will prevail.

Id. at 254.

The Court then discussed the "consumer expectations" test and concluded:

> Thus, in a "consumer expectations" analysis, for a plaintiff to recover, the defect in a product which causes his injuries must not be one which the plaintiff, as an ordinary consumer, would know to be unreasonably dangerous to him. In other words, if the plaintiff, applying the knowledge of an ordinary consumer, sees a danger and can appreciate that danger, then he cannot recover for any injury resulting from that appreciated danger.

617 So.2d at 254.

The Court then set out the analysis that is to be conducted under "risk-utility."

> Thus, even if a plaintiff appreciates the danger of a product, he can still recover for any injury resulting from that danger provided that the utility of the product is outweighed by the danger that the product creates.

Id. at 254. The Court then held:

> . . . we hold, necessarily, that the "patent danger" bar is no longer applicable in Mississippi. Under a "risk-utility" analysis, the "patent danger" rule does not apply. In "risk-utility," the openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous. (citations omitted)

Id. at 256, fn. 4.

Under either analysis, "consumer expectations" or "risk utility," the jury has to make the same basic finding,

that is that the product was in "a defective condition unreasonably dangerous." Restatement (Second) of Torts § 402A. The theory is the same. The only difference is the analysis.

Under the instructions given by the Court to the jury at the trial of this case, the jury had to find that the motorcycle was in "a defective condition unreasonably dangerous" and further had to find that the danger was not "open and obvious." The consumer expectations analysis was a far stricter test or standard for plaintiff to meet and prove than would have been the standard or test under "risk-utility."[15] This Court is of the opinion that since the case was submitted on the stricter theory of Mississippi law, which was requested by defendants, that defendants have no basis to object. *See Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 745 (5th Cir.1993) (case submitted to the jury under a higher standard of care, not reversible error).

Defendant has cited no authority whereby a party can contend for a stricter standard, win on that issue, and then come back and obtain a new trial because the jury was instructed on a stricter standard as requested and contended for by that party. The Court has found no authority to that effect. Defendants requested this Court to submit this case to the jury under the "consumer expectations" analysis. The Court did what defendants

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[15] Plaintiff argues that *Prestage* does not do away with the "consumer expectations" analysis – that it merely gives the plaintiff an option of traveling under the less strict "risk-utility" analysis. The Court, for the reasons stated in this section, does not reach this argument.

requested. Under the facts of this case, defendants cannot now come back and obtain a new trial on the basis that the Court committed error in granting instructions requested by Defendant. If that could be done, litigation would never end. When a party requests an instruction and obtains it, that party can set aside a jury verdict and get a new trial because such instruction was erroneous only if it was "plain error." *See Litherland v. Petrolane Offshore Const. Services,* 546 F.2d 129, 133, fn. 4 (5th Cir.1977). "Plain error" is error which rises to the level of a manifest injustice or a fundamental miscarriage of justice. *See Bissett v. Ply-Gem Industries, Inc.,* 533 F.2d 142 (5th Cir.1976).[16]

In analyzing the facts of this case and the theory and analysis under which it was presented to the jury, this Court concludes that no manifest injustice will result in not granting the defendants' Motion for New Trial. Defendants lost under an analysis more strict than the analysis they were entitled to present to the jury. Defendants have not demonstrated a "manifest injustice" nor a "fundamental miscarriage of justice."

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[16] "As a general rule, an appellant cannot assign as error the trial court's failure to give an instruction which was not requested." *Bissett,* 533 F.2d at 145. *See also, Herman v. Hess Oil Virgin Islands Corp.,* 524 F.2d 767, 772, fn. 15 (3d Cir.1975) (reversal not required for failure to charge jury on a legal theory not requested by any of the parties).

CONCLUSION

The Court having responded to all issues and arguments addressed to the Court by the parties, and having responded to all matters directed to its attention by the remand from the Fifth Circuit and having concluded that it is immaterial whether House Bill 1270 codified Mississippi law as it existed prior to *Prestage*, that House Bill 1270 has no effect on this case, that *Prestage* abolishes "open and obvious" as a total bar to recovery in products liability cases, that *Prestage* controls this case, that the application of *Prestage* will not result in manifest injustice to defendants, that the *Prestage* decision precludes summary judgment in this case, that the Defendants' Second and Supplemental Motion for Judgment Notwithstanding the Verdict should be stricken, and that defendants are not entitled to a new trial, the Court reaffirms the judgment previously entered in this matter and it is so ordered.

SO ORDERED AND ADJUDGED.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60492

JAMES C. SATCHER,

Plaintiff-Appellee,

versus

HONDA MOTOR COMPANY, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 5/30/95, 5 Cir., ___, ___ F.3d ___)

(JULY 24, 1995)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX I

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX J

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

HONDA MOTOR CO., LTD. SUBSIDIARIES

Japan

Honda R&D Co., Ltd.
Honda Engineering Co., Ltd.
Yutaka Giken Co., Ltd.
Zaotec, Inc.
Seikigiken Kogyo Co., Ltd.
Asama Giken Co., Ltd.
Honda Buhin Service Co., Ltd.
Denshi Giken Co., Ltd.
Honda Foundry Co., Ltd.
Honda Lock Mfg. Co., Ltd.
Honda Finance Co., Ltd.
Honda Motor Parts Service Co., Ltd.
Honda International Sales Corporation
Honda Access Corp.
Honda Parts Sales Co., Ltd.
Suzuka Circuitland Co., Ltd.
Honda Trading Corporation
Honda Leasing Corporation
Honda Sogo Tatemono Co., Ltd.
Honda Clio Shin Tokyo Co., Ltd.
Honda Racing Corp.
Honda Sun Mfg., Co., Ltd.
Honda Parking Co., Ltd.
Kobounosato Honda Co., Ltd.

North America

American Honda Motor Co., Inc.
Honda North America, Inc.
Honda of America Mfg., Inc.
Indiana Precision Technology, Inc.
American Honda Finance Corporation
Honda International Trading Corp.

Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Canada, Inc.
Honda de Mexico, S.A. de C.V.

Europe

Honda Austria G.m.b.H.
Honda Europe, N.V.
Honda Belgium N.V.
Honda Motor Europe Limited
Honda of the U.K. Manufacturing Limited
Honda France S.A.
Honda Deutschland G.m.b.H.
Honda R&D Europe G.m.b.H.
Honda Netherlands B.V.
Honda International Finance B.V.
Honda Italia Industrieale S.p.A.
Honda Automobile Italia, S.p.A.
Montesa Honda S.A.
Honda (Suisse) S.A.

Brazil

Honda Motor do Brasil Ltda.

Australia

Honda Australia Pty. Ltd.

New Zealand

Honda New Zealand Limited

Asia

Prospect Engine Manufacturing
Asian Honda Motor Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Engine Mfg. Philippines, Inc.

Venezuela

Honda Venezuela C.A.

Honda North America, Inc. Subsidiaries

United States of America

Honda North America, Inc.
American Honda Motor Co., Inc.
American Honda Finance Corp.
Honda Trading of America Corp.
Honda of America Mfg., Inc.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Power Equipment Mfg., Inc.
Honda Performance Development, Inc.
American Honda Education Corp.
Calhac
Benton Water Supply, Inc.
American Honda Foundation
KTH Parts Industries, Inc.
Bellemar Parts Industries
Findlex Corporation
New Sabina Industries
Greenville Technology Incorporated
Tomasco Mulciber
Sunbury Components Industries, Inc.
T.S. Trim
Jefferson Industries Corporation
Indiana Precision Technology, Inc.
Blanchester FCM, Inc.
Yotec
Technical Auto Parts
Jay Tech
Honda All Lock
Midwest Express
Honda Accessory
VSK

Canada

Honda Canada, Inc.
Honda of Canada Mfg., Inc. (Div. of CH)
Honda Canada Finance
F&P Mfg., Inc.
BPI Canada
Yachiyo of Ontario

Mexico

Honda de Mexico, S.A. de C.V.

(2)

Supreme Court, U.S.
FILED
NOV 22 1995

No. 95-653

In The

Supreme Court of the United States

October Term, 1995

HONDA MOTOR CO., LTD., AMERICAN HONDA MOTOR CO., INC., AND HONDA R & D CO., LTD.,

Petitioners,

versus

JAMES C. SATCHER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

Rule 15.2 requires that an opposition to a petition for writ of certiorari "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup.Ct.R. 15.2. The penalty for failure to make such an admonition to the Court in an opposition is a possible waiver in the event certiorari is granted.

The Questions Presented by Honda Motor Company in its petition for certiorari contain a material misstatement, which when corrected, completely eviscerates the justification given by Honda for this Court's consideration of this case. Question 1 is predicated upon the assumption of "the district court's failure to charge the jury with the applicable substantive law." Question Two likewise presupposes a case where "the district court failed to correctly instruct the jury on the law applicable to the case." *See* Honda's Petition, at i and ii. The assumption and presupposition are false, and it is the falsity of this assumption that is the heart of the lower courts' refusal to grant Honda a new trial. While the district court certainly did not convey to the jury a classic "risk/utility" products liability instruction, its "consumer expectations" instruction required the jury to make a "risk/utility" determination as an element of an "consumer expectations" inquiry. While the jury may have been asked to include in its determination of liability additional considerations other than simply balancing the risk and utility of the product, it was certainly entreated to minimally make the "risk/utility" assessment. That the

QUESTIONS PRESENTED – Continued

jury found against Honda under the more stringent "consumer expectations" test necessarily means that the jury found that the risk presented by Honda's product outweighed its utility. Only Satcher would have cause to complain that the jury was given a more stringent instruction, had the jury found against him. However, since the jury applied the higher standard, which included, as an element, the "risk/utility" formulation, and found against Honda under the more rigorous test, Honda's contention that the jury was not properly instructed on the applicable substantive law is a half-truth that does not constitute the solid ground necessary to support the weight of Honda's petition.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1.

Honda's *Erie* contention is entirely predicated upon the view that the federal courts have failed to follow Mississippi law. But, it was the federal courts' absolute insistence on following the *latest* expression of Mississippi law that compelled them to apply *Sperry-New Holland v. Prestage*, 617 So.2d 248, 253 (Miss. 1993), as they were *Erie* bound to do. *See Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941).

Honda's complaint, then, is not with the federal court's application of *Erie*, but with the Mississippi Supreme Court's holding in *Prestage* that its rejection of the "open and obvious" defense did not change Mississippi law, but simply reflected the state of Mississippi law since its decisions in *Whittley v. City of Meridian*, 530 So.2d 1341 (Miss. 1988), and *Hall v. Mississippi Chemical*, 528 So.2d 796 (Miss. 1988). *See* 617 So.2d at 253. To be sure, this holding is at odds with the Fifth Circuit Court of Appeals' pattern of decisions all holding that, despite *Hall*, Mississippi embraced the "open and obvious" defense. *See Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir. 1993) (vacated on rehearing); *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386 (5th Cir. 1992); *Toney v. Kawasaki Heavy Industries, Ltd.*, 875 F.2d 162, 167 (5th Cir. 1992), and *Melton v. Deere & Co.*, 887 F.2d 1241, 1243 (5th Cir.

1989). *Prestage* proves that these Fifth Circuit cases were all simply incorrect interpretations of Mississippi law.

The real question presented by this case, then, is whether *Erie* (or some other doctrine) compels a federal court to *reject* the latest expression of Mississippi law (*Prestage*'s express statement that it did not change the law) in order to perpetuate an erroneous line of federal jurisprudence interpreting federal law. This Court has already answered that question in *Vandenbark*.

Moreover, Honda's contention is entirely premised on the notion that "consumer expectations" and "risk/utility" are not simply two ways of examining the same question, which is false. Mississippi first adopted the language of the Restatement (Second) of Torts 402A's product liability cause of action in *State Stove Mfg. Co. v. Hodges*, 189 So.2d 113 (Miss. 1966), *cert. denied, sub nom. Yates v. Hodges*, 386 U.S. 912, 87 S.Ct. 860, 17 L.Ed.2d 784 (1967).[1] In *Prestage*, the Mississippi Supreme Court confirmed that "section 402A is still the law in Mississippi." 617 So.2d at 254. The only difference is in the analytical framework to be employed to determine whether a defective condition, unreasonably dangerous to the user, the

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[1] The term "consumer expectations" was introduced through comment (i) to Section 402A. The comment states that "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A (1965).

linchpin of liability under 402A, exists.[2] As the district court stated, "under either analysis, 'consumer expectations' or 'risk utility,' the jury has to make the same basic finding, that is that the product was in 'a defective condition unreasonably dangerous.' The theory is the same. The only difference is the analysis." *Satcher v. Honda Motor Co.*, 855 F.Supp. 886 (S.D. Miss. 1994).

When the two analytical frameworks are compared, the supposed differences discussed by Honda's brief become much more elusive than real. The only real difference is the availability of the patent danger rule. The "consumer expectations" theory, as applied in Mississippi, did not so much define under what circumstances a plaintiff *could* recover, as it did prohibit the circumstances under which he or she *could not* recover. *Prestage*'s entire explanation of the theory is that "for a plaintiff to recover, the defect in a product which causes his injuries must not be one which the plaintiff, as an ordinary consumer, would know to be unreasonably dangerous to him." 617 So.2d 254. No where is the "defect" which must be unknown, or the standard to be employed to find a "defect," defined. Under the "risk/utility" theory, "a product is unreasonably dangerous if a reasonable person would conclude that the danger-in-fact, whether foreseeable or not, outweighs the utility of the product." *Id.* The *only* differentiation between the two methodologies observed by the Mississippi Supreme Court is in the

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[2] Under 402A, the plaintiff must prove that he or she (1) was injured by the product, (2) the injury resulted from a defective condition unreasonably dangerous to the user, and (3) the defect existed at the time it left the hands of the manufacturer.

relevance of the plaintiff's knowledge or perception of the danger. Under the "consumer expectations" theory, it is dispositive; under the "risk/utility" theory, it is merely one factor to be examined. 617 So.2d at 256 n.4.

The plaintiff's burden with regard to the existence of an unreasonable defect is, in reality, not different. "In determining a consumer's expectations regarding a product's safety, factors such as the relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk are to be considered." *Baughn v. Honda Motor Co., Ltd.*, 727 P.2d 655, 660 (Wash. 1986). The balancing of risk versus utility is "necessarily relevant to a determination that the product, as designed, is unreasonably dangerous in its failure to conform to ordinary consumer's expectations." *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1195 (4th Cir. 1982), interpreting Restatement 402A's "consumer expectations" theory under South Carolina law. Mississippi law is the same. *See Hall v. Mississippi Chemical Exp., Inc., supra,* and *Whittley v. City of Meridian, supra.*[3]

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[3] Perhaps for this reason, most courts have found that the "consumer expectations" theory and the "risk/utility" test are not mutually exclusive. *See Beavercreek Local School District v. Basics, Inc.*, 595 N.E.2d 360, 375 (Ohio App.), *cert. denied*, 575 N.E.2d 219 (Ohio 1991); *Dewey v. Brown & Williamson Tobacco Corp.*, 542 A.2d 919, 925 (N.J. App. 1988), *aff'd in part, rev'd on other grounds*, 577 A.2d 1239 (N.J. 1990). *See, e.g, Goode v. Herman Miller, Inc.*, 811 F.2d 866, 869 (5th Cir. 1987) (Louisiana law), noting that product was defective under *both* theories.

2.

Honda's due process claim was not preserved for appellate review. It is well-settled that new issues will not be considered for the first time on appeal. *See McLean v. International Harvester Co.*, 902 F.2d 372, 374 (5th Cir. 1990); *Matter of Texas Mortgage Services Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985). This rule is particularly appropriate when constitutional questions are not raised before the trial court. Here, the only previous reference to Honda's constitutional challenge is one sentence in its Response to Plaintiff's Motion to Reaffirm Judgment, wherein it states that "[n]either due process nor justice permit" less than a new trial. 13 R 3552. This oblique reference hardly preserves the full blown due process contention raised for the first time on appeal and now before this Court.

In any event, Honda's "due process" claim is totally specious. It is grounded upon the assumption that Honda has some constitutional right to rely on or take advantage of previous federal jurisprudence that the Mississippi Supreme Court has now declared to be erroneous. There is no rule of constitutional law that gives a civil litigant a vested, or even a reliance, interest in erroneous jurisprudence. *See Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164, 1173 (8th Cir. 1990), *cert. denied*, 500 U.S. 915, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991), citing *United States v. Estate of Donnelly*, 397 U.S. 286, 295, 90 S.Ct. 1033, 1038, 25 L.Ed.2d 312 (1970) ("A party does not, of course, have a vested right in a judicial decision."). As a consequence of the *Erie* doctrine, "the duty rests upon federal courts (in diversity cases) to apply state law under the Rules of Decision statute in accordance with the then controlling

decision of the highest state court," so long as a case is still pending. *See Vandenbark v. Owen's-Illinois Glass Co., supra,* 311 U.S. at 543, 61 S.Ct. at 350 (1941); *Grubbs v. Gulf Intern. Marine, Inc.,* 985 F.2d 762, 763 (5th Cir. 1993), *modified on other grounds* by 13 F.3d 168 (5th Cir. 1994). This is so even if the most recent pronouncement represents a "change" in the law. *See St. Paul Ins. of Bellaire, Texas v. AFIA Worldwide Ins. Co.,* 937 F.2d 274, 278 (5th Cir. 1991); *Sioux Ltd., Sec. Litigation v. Coopers & Lybrand,* 914 F.2d 61 (5th Cir. 1990).

The only limitation on this rule is *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), which provides that under certain circumstances, a judicial decision may not be retroactively applied. However, *Chevron* does not apply here. First, the initial element of the *Chevron* test is whether the judicial decision actually "changes" the law. As explained above, *Prestage* may have overruled erroneous prior jurisprudence, but it did not change the law. Second, the *Chevron* test has no application in diversity cases. There, the only inquiry is whether the state court decision would be retroactively applied by the state court. *See Williams v. United States Elevator Corp.,* 920 F.2d 1019, 1026 n.1 (D.C. Cir. 1990) (Edwards, J., dissenting) *and numerous cases cited therein; see also Samuels v. Doctors Hospital, Inc.,* 588 F.2d 485, 489 n.8 (5th Cir. 1979).[4]

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[4] There is no question that the Mississippi Supreme Court would apply *Prestage* retroactively, given the holding that there was no present change in the law and the application of the holding of the case to the facts before the court. *See Moorehead v. Mitsubishi Aircraft Intern., Inc.,* 828 F.2d 278, 289 (5th Cir. 1987).

In a diversity case, the issue "is not a true question of retroactivity, but a question of a controlling precedent intervening between the date on which a lower court ruled and the date on which the ruling is considered on appeal." *Cracker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986). Indeed, retroactivity cannot be a constitutional issue since "judicial decision[s] . . . are traditionally regarded as an expression of **pre-existing** law." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 543, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring), *citing United States v. Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").

> We have no occasion to consider whether this division of time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law. **Sound or unsound, there is involved in it no denial of a right protected by the federal constitution.** . . . A state in defining the limits of adherence to precedent may make a choice for itself between the principal of forward operation and that of relation backward.

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932), cited in *American Trucking Assoc., Inc., v. Smith*, 496 U.S. 167, 110 S.Ct. 2323, 2340, 110 L.Ed.2d 148 (1990). What appears to be "unfairness" to Honda, is certainly not constitutionally offensive, and is no more than the allocation of the burden of surprise "between two surprised parties [to] the party who guessed wrong about the direction in

which the law was moving." *E.E.O.C. v. Vacutech*, 842 F.2d 936, 941 (7th Cir. 1988).

3.

Honda's claim that the lower courts have so egregiously departed from established procedure as to justify this Court's intervention is simply false. Assuming that error was committed, absent a showing of prejudice, Honda is not entitled to a new trial. See *Metromedia Co. v. Fugazy*, 983 F.2d 350, 364-65 (2d Cir. 1992), *cert denied*, ___ U.S. ___, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993), wherein the court refused to grant a new trial even though an obvious error in instructing the jury as to a fundamental element of the plaintiff's claim had been made because there was no showing that, had the correct instruction been given and the jury arrived at the same conclusion, its finding could have been "set aside for lack of evidence." *See also Union Mechling Corp. v. Carmadelle*, 624 F.2d 677, 679 (5th Cir. 1980), citing *Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176, 178-79 (5th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979) ("denial of a motion for new trial based on changes in the law reversible on appeal only for prejudicial error or manifest injustice"). *See also Williams v. United States Elevator Corp., supra* ("Regardless of the retroactivity [of the post-judgment decision purportedly changing the law,] the alleged error in the jury instructions was harmless and does not require us to remand this case for a new trial."). *Castrignano v. E. R. Squibb & Sons, Inc.*, 900 F.2d 455, 458 (1st Cir. 1990) (defendant not entitled to new trial based upon change in law unless application of the new law "could have led to a different outcome in this case.");

Cavalier Carpets, Inc. v. Caylor, 746 F.2d 749, 758-59 (11th Cir. 1984) (holding party not entitled to a new trial based upon post-judgment change in the law where the error was harmless, and finding that even an improper burden of proof could be harmless and thus not prejudicial, where a fair view of the jury's verdict and the evidence reflects that the jury would have found against the party even under the correct standard).

Honda has not articulated a single fact, legal theory, or issue that would have been tried differently had a pure "risk/utility" charge been given to the jury. While Honda complains about the fact it was led to try the case one way, and should be given a chance to try it another (a second bite at the apple that every losing litigant would love to receive), it has *never* before articulated to either the district court, the appellate court, or now this Court, what it would do differently if given that chance.

Moreover, Honda never asked for a "risk/utility" instruction, as recognized by the district court. *See* 855 F.Supp. at 896. In fact, both parties voluntarily selected, in the midst of a hotly contested debate, the theory under which they believed they had the best chance of success, which was "consumer expectations." Honda believed this was preferable because it was a higher burden for Satcher to meet; Satcher selected this test because of Fifth Circuit precedent in order to prevent reversible error. Honda took its best shot and lost. Now it wants a second shot, because second best is better than losing. This is hardly the kind of manifest injustice required to entitle Honda to a new trial. *See Castrignano, supra*, 900 F.2d at 462 (defendant who "gambled that it would be entitled to prevail on its claim of entitlement to the application of comment to

Restatement 402A," but who ultimately lost that wager by a post-judgment decision of the Rhode Island Supreme Court, not entitled to the "pay off" of a new trial); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985) ("[C]ourts generally find no ground for reversal when the instruction given was consistent with the position of the party seeking relief," and such relief would be "particularly anomalous" where "the error is in [the complainant's] favor.").

CONCLUSION

Honda has not presented this Court with a cert-worthy issue. Its petition for writ of certiorari should be denied.

Respectfully submitted,

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